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In the

Supreme Court of the United States

OCTOBER TERM, 1968

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

—v.—

HON. BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HORACE S. MANGES
IRA M. MILLSTEIN
DONALD J. WILLIAMSON
A. PAUL VICTOR
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022

W. DONALD McSWEENEY
WILLIAM A. MONTGOMERY
SCHIFF HARDIN WAITE
DORSCHEL & BRITTON
231 South La Salle Street
Chicago, Illinois 60604

H. TEMPLETON BROWN
LEE N. ABRAMS
MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT
231 South La Salle Street
Chicago, Illinois 60604

SAMUEL WEISBARD
DAVID L. PORTER
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

(List of counsel for petitioners continued on inside cover)

EARL A. JINKINSON
JOHN W. STACK
WINSTON, STRAWN, SMITH & PATTERSON
1400 First National Bank Building
Chicago, Illinois 60603

CONRAD W. OBERDORFER
CHOATE, HALL & STEWART
28 State Street
Boston, Massachusetts 02109

ROBERT W. BERGSTROM
STEPHEN M. SLAVIN
BERGSTROM & OLSON
39 South La Salle Street
Chicago, Illinois 60603

DAVID P. LIST
KENNETH A. MANASTER
LEIBMAN, WILLIAMS, BENNETT, BAIRD & MINOW
208 South La Salle Street
Chicago, Illinois 60604

EARL E. POLLOCK
ALAN H. SILBERMAN
SONNENSCHEIN, LEVINSON, CARLIN, NATH & ROSENTHAL
69 West Washington Street
Chicago, Illinois 60602

FRED BARTLIT
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS
2900 Prudential Plaza
Chicago, Illinois 60601

LEO ROSEN
GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022

BELLA L. LINDEN
DAVID BLASBAND
LINDEN & DEUTSCH
529 Fifth Avenue
New York, New York 10017

JOHN J. McHUGH
CHADWELL, KECK, KAYSER, RUGGLES & McLAREN
135 South La Salle Street
Chicago, Illinois 60603

BRUCE A. HECKER
LEON P. GOLD
SHEA, GALLOP, CLIMENKO & GOULD
330 Madison Avenue
New York, New York 10017

EDGAR E. BARTON
KEVIN L. CARROLL
WHITE & CASE
14 Wall Street
New York, New York 10005

JOHN C. CHRISTIE, JR.
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South La Salle Street
Chicago, Illinois 60603

WILLIAM E. STOCKHAUSEN
SATTERLEE, WARFIELD & STEPHENS
277 Park Avenue
New York, New York 10017

Attorneys for Petitioners

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No. .....

In the

Supreme Court of the United States

October Term, 1968

Harper & Row Publishers, Inc., *et al.*,

Petitioners,

—v.—

Hon. Bernard M. Decker,
United States District Judge, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, defendants in multi-district, multi-party antitrust treble-damage litigation which has been consolidated before respondent for pretrial proceedings pursuant to 28 U.S.C. §1407, petition for a writ of certiorari to review an order of the United States Court of Appeals for the Seventh Circuit, entered in this case on January 9, 1969.

Opinion Below

The Court of Appeals filed no opinion, other than its order of January 9, 1969 (App. A, *infra,* pp. 1a-2a), which is unreported. The relevant orders of respondent, which were issued on July 16, November 27, and December 13, 1968 (App. B, C, D, *infra,* pp. 3a-13a), are also unreported.

Jurisdiction

On January 9, 1969, the Court of Appeals entered its order denying the petition for a writ of mandamus (App. A, *infra,* pp. 1a-2a). On January 18, 1969, Mr. Justice Marshall entered an order staying the production of grand jury and other documents which had been ordered by respondent, "providing a petition for a writ of certiorari . . . is filed in this Court on or before February 10, 1969," in which event the "stay is to remain in effect pending the Court's action on the petition" (App. E, *infra,* p. 14a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The issues raised by this petition are of first impression and are of paramount importance to the proper administration of justice under recently-enacted 28 U.S.C. §1407. More specifically, the significant policy issues raised by this petition are:

(1) Whether, in the administration of complex litigation consolidated for pretrial discovery proceedings under 28 U.S.C. §1407, considerations of convenience and expediency can supersede and render nugatory:

> (a) long-established principles of grand jury secrecy, and
>
> (b) the rights guaranteed to litigants under Rule 34 of the Federal Rules of Civil Procedure and under fundamental doctrines of due process of law; and

(2) Whether private treble-damage plaintiffs should be allowed wholesale access, for discovery purposes, to the documents subpoenaed by a grand jury which had investi-

gated possible antitrust violations—even though the grand jury investigation was significantly broader in scope than the claims asserted in the treble-damage actions—solely on the basis of unsupported assertions regarding (a) the relevance and materiality of those grand jury documents, and (b) the expediency and convenience which purportedly would result from their disclosure.

Statute and Rule Involved

The text of 28 U.S.C. §1407, and of Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 34, are printed in Appendix F, *infra,* pp. 15a-19a.

Statement

The petition for mandamus, which the Court of Appeals denied on January 9, 1969, was filed on December 13, 1968 pursuant to 28 U.S.C. §1651. It sought:

> (1) to compel respondent to vacate his improperly issued orders requiring the production of documents, including grand jury documents, and
>
> (2) to compel respondent to conduct discovery proceedings in accordance with the Federal Rules of Civil Procedure, by adhering to established procedures with respect to Rule 34 motions for the production of documents.[1]

[1] Respondent's document production orders were entered in the numerous related private antitrust treble-damage actions (involving library editions of children's books) which have been consolidated before respondent for pretrial purposes pursuant to 28 U.S.C. §1407. Some of the petitioners here are defendants in all of the treble-damage actions to which respondent's document production orders are applicable, but many other petitioners are defendants in only a few (in some cases only two or three) of those treble-damage actions.

Although there was nothing in the record before respondent upon which he could properly predicate a finding of "good cause" or "particularized need," and although there had never been an appropriate hearing with respect to the existence of the requisite "good cause" and "particularized need," respondent nevertheless ordered the defendants in those treble-damage actions to produce certain categories of documents, and also ordered that the plaintiffs in those actions could obtain from the Antitrust Division all of the documents which various grand juries had subpoenaed from any of the defendants during grand jury investigations of the publishing industry.[2]

In order to demonstrate the foregoing, and, more importantly, to demonstrate that respondent's orders were based entirely upon considerations of convenience and expediency, it is necessary to describe fully the circumstances attendant to the entry of those orders, as well as the same treble-damage plaintiffs' prior unsuccessful efforts to obtain access to the same grand jury documents which respondent has now made available to them.

* * * * *

In the course of investigations of the publishing industry which commenced in or about May 1966, one or more federal grand juries subpoenaed documents from various publishers, wholesalers and other persons. Al-

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[2] Ordinarily, parties can assert their rights by refusing to produce disputed documents, thus enabling the issues to be resolved on any contempt proceeding which might be instituted. Cf. *Bowman Dairy Co.* v. *United States,* 341 U.S. 214 (1951). Here, however, respondent is permitting plaintiffs to copy the disputed documents *in the government's possession.* Petitioners could not, therefore, refuse to produce and thus could assert their rights only by seeking the extraordinary writ of mandamus from the Court of Appeals.

though no indictments resulted from those grand jury investigations, the subpoenaed documents were retained by the Antitrust Division attorneys who had supervised the investigation, and thus remained under the supervision of Chief Judge Campbell of the Northern District of Illinois (the district in which the grand juries were impaneled).

On April 18, 1967, the Justice Department instituted 18 separate civil actions for injunctive relief, also in the Northern District of Illinois. The complaint in each of those 18 actions named only a single defendant (a publisher of children's books). The gist of each complaint was resale price maintenance, involving the relationship between the single named publisher-defendant and the wholesalers which distributed library editions of that publisher's children's books. Those civil actions were terminated by 18 identical consent decrees, filed on October 23, 1967 and entered by Judge Marovitz on November 27, 1967. Each consent decree expressly stated that it did not constitute an "admission by either party in respect to any issue" raised by the complaint.

The first related private treble-damage action involving library editions of children's books was filed in the Eastern District of Pennsylvania in June 1966. Thereafter, a number of similar (although not identical) treble-damage actions were instituted by states and municipalities in various district courts. The first such action instituted in the Northern District of Illinois was filed on November 1, 1967, and that action was assigned to respondent for all purposes. The complaints in the treble-damage actions are much broader in scope than the complaints in the govern-

ment civil actions, both in terms of the conspiracies alleged and the parties involved.[3]

Commencing on November 2, 1967, several of the treble-damage plaintiffs sought to intervene in the government civil actions for the purpose, *inter alia,* of obtaining copies of all documents which the Antitrust Division had secured during its investigations. At a hearing on November 13, 1967 with respect to their efforts to intervene, counsel for many of the would-be interveners advised Judge Marovitz that:

> "my primary interest is to secure from the government the results of its investigation and I will try the case myself. But, I must have the results of its investigation, the documents it has collected and the statements it has prepared" (Tr., p. 40).[4]

Although Judge Marovitz denied the petition for intervention, on November 20, 1967 he directed that all of the documents in the Antitrust Division's possession should remain in the custody of the Chicago Field Office "until further order of the Chief Judge of the United States District Court for the Northern District of Illinois."

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[3] For example, the complaints in the treble-damage actions allege three different types of conspiracies: horizontal conspiracies among publishers; horizontal conspiracies among wholesalers; and vertical conspiracies among publishers and wholesalers. Moreover, *most* of the companies which are defendants in the treble-damage actions were *not* among the 18 publishers which were defendants in the government civil actions; the treble-damage plaintiffs have asserted claims against at least 9 publishers and 25 wholesalers which were not defendants in the government civil actions.

[4] That attorney for the would-be interveners subsequently became liaison counsel for the treble-damage plaintiffs and briefed this matter on behalf of respondent before the Court of Appeals. He will be referred to hereinafter as "plaintiffs' liaison counsel."

Meanwhile, on November 15, 1967, plaintiffs' liaison counsel filed a petition by which many of the treble-damage plaintiffs sought production of all documents obtained by the Antitrust Division (whether by subpoena or otherwise) during its investigations, as well as copies of the grand jury subpoenas and lists of the grand jury witnesses.[5] That petition was an unprecedented request by private litigants to obtain wholesale access to grand jury proceedings, solely to facilitate and expedite discovery efforts in their civil damage actions. Because that proceeding was not a civil action, and because it did not involve a motion for production of documents under Rule 34 of the Federal Rules of Civil Procedure, the parties thereto did not discuss that Rule or the principles which govern its application in federal civil actions.

On the contrary, the treble-damage plaintiffs did not even attempt to demonstrate that the requested grand jury materials were material or relevant; instead they relied upon the naked, unsupported assertion that *all* of those materials were "material, relevant and essential to prove the price-fixing conspiracies charged in [the] pending treble damage antitrust actions" (Petition to Chief Judge Campbell, p. 9). Moreover, they based their unprecedented request almost entirely upon the unsound premise that considerations of convenience and expediency can override litigants' due process rights and long-established principles of grand jury secrecy.[6]

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[5] That petition was captioned *In Re Grand Jury Proceedings*, No. 66 GJ 3003 (N.D. Ill.), and was directed to Chief Judge Campbell (who is responsible for supervising the grand juries in that District).

[6] For example, the treble-damage plaintiffs asserted:

(1) that disclosure of the requested grand jury materials would "relieve" them "of the onerous and expensive burden"

The publisher-defendants' brief, on the other hand, related primarily to the plaintiffs' failure to satisfy the "particularized need" test which this Court has established as a prerequisite to any invasion of grand jury secrecy. In addition, that brief pointed out that arguments relating to the *desirability* of coordinated discovery should properly be addressed to the Coordinating Committee For Multiple Litigation, rather than to Chief Judge Campbell.[7]

On June 27, 1968, Chief Judge Campbell, in an opinion and order entered on his behalf by Judge Robson, stated that:

(n. 6 cont'd)

of conducting appropriate discovery in their damage actions, in accordance with the Federal Rules of Civil Procedure (Petition to Chief Judge Campbell, p. 9); and

(2) that an order permitting them to conduct their document discovery in the proceeding before Chief Judge Campbell (rather than in the various courts where the treble-damage actions were pending) would achieve "judicial efficiency, economy and uniformity of decision," by avoiding "a multiplicity" of Rule 34 motions for document production (Plaintiffs' Memorandum to Chief Judge Campbell, p. 7).

The phrase "good cause" appeared in the treble-damage plaintiffs' papers only as part of a sweeping conclusory paragraph in the prayer for relief, as follows: "for good cause shown by the facts stated herein, petitioners pray that the Court enter the following orders . . ." (Petition to Chief Judge Campbell, p. 11).

[7] Despite assertions made by the treble-damage plaintiffs in the answer and supporting brief which they submitted to the Court of Appeals (pp. 31-32) (hereinafter referred to as "Answer and Supporting Brief"), petitioners have never, either in their brief to Chief Judge Campbell or at any other time, conceded (or even suggested) that the informal Coordinating Committee For Multiple Litigation had jurisdiction or authority to rule upon, or to enter binding orders with respect to, questions of document production or other discovery motions. In fact, the Coordinating Committee itself never claimed such jurisdiction or authority; it always described its positions with respect to the merits of specific discovery issues as mere "recommendations" or "suggestions" to the various district judges.

> "it has been determined that this petition should be denied because adequate civil procedures are currently available to the parties from which they can secure any discovery of the documents and information mentioned in the petition to which they are entitled" (Opinion and Order, pp. 5-6).

The Chief Judge found that there were "no exceptional circumstances which would warrant the granting of the petition," and stated that he was denying the petition "without prejudice to the contentions of petitioners that they are entitled to the discovery rights and privileges as may be accorded to them under the Federal Rules of Civil Procedure and without prejudice to a renewal of the petition if exceptional circumstances occur in the future" (Opinion and Order, p. 11).[8]

Several months prior to the entry of Chief Judge Campbell's order, the Coordinating Committee, apparently *sua sponte,* commenced efforts to achieve coordinated discovery in the pending private treble-damage actions. In this connection, on or about February 26, 1968, each of the private treble-damage action district judges (including respondent) issued an identical "memorandum order," providing that interested counsel could submit certain suggestions to the court (with a copy to the Coordinating Committee), regarding

> "the desirability and feasibility of: (1) a national program of co-ordinated discovery and pretrial procedures; (2) the creation and maintenance of national document depositories; [and] (3) the development of

[8] Although Chief Judge Campbell's opinion and order referred to the April 19 proceedings before the Coordinating Committee (discussed *infra,* pp. 12-14), it did not comment upon the propriety of those proceedings or upon the soundness of any of the recommendations which the Coordinating Committee had made.

> standard transaction interrogatories and the planning of a 'first wave' of discovery consisting of written interrogatories designed: (a) to disclose the names and location of [potential] witnesses . . ., and (b) to determine the existence, location and custodian of documents, the production of which may be sought on the merits."

On or about March 21, 1968, and before counsel had submitted the requested suggestions, each of the private treble-damage action district judges (including respondent) entered an identical "Order Establishing Schedule For A 'First Wave of Discovery' Including Transaction Information." That order directed that "Upon the recommendation of the Co-Ordinating Committee . . . , and for good cause appearing," the parties should file with the court (with copies to the Coordinating Committee)

> "requests for leave to propound written interrogatories, for orders for production of documents and for leave to schedule depositions upon oral interrogatories for the following purposes: (a) to discover the names and location of witnesses . . . ; (b) to discover the existence, location and custodian of documents . . ., the production of which may be sought on the merits; and (c) to discover information concerning the transactions upon which the claims for relief are based."

Finally, on or about April 1, 1968, each of the private treble-damage action district judges (including respondent) issued a "Memorandum to Counsel," which advised that, "upon recommendation of the Co-Ordinating Committee For Multiple Litigation," the Coordinating Committee would hold a hearing on April 19, 1968 concerning the

matters referred to in the February 26 and March 21 orders.[9]

On April 3, 1968, plaintiffs' liaison counsel filed a memorandum in response to the March 21 order in the actions before respondent. In that memorandum (at pp. 2-3), plaintiffs' liaison counsel made the following significant statement with respect to the purpose of the petitions for wholesale disclosure of grand jury documents and witness lists then pending before Chief Judge Campbell:

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[9] The language of those three orders is virtually identical to that contained in the discussion of the appropriate scope of the "first wave of discovery" in complex multi-district litigation, which appears in the *Manual For Complex and Multi-District Litigation.* That *Manual,* which was prepared by a Subcommittee of the Coordinating Committee and subsequently approved by the Judicial Conference of the United States, provides, in pertinent part:

> "The main objective to be accomplished in the early stages of the recommended program is the completion of a first wave of discovery to be followed in the later phases by a second wave of discovery on the merits. The first wave of discovery should be designed to disclose as far as possible (1) the names and location of witnesses whose written interrogatories or depositions upon oral interrogatories may be sought on the merits; (2) the existence, location and custodian of documents and other physical evidence, the production of which may be sought on the merits; and (3) information concerning the transactions upon which the claims for relief are based.
>
> ". . . the judge should initiate the first wave of discovery by establishing a schedule for counsel to submit requests for leave to propound written interrogatories, for leave to schedule depositions upon oral interrogatories, and for orders for production of documents *all to ascertain only the information listed in (1), (2) and (3) above,* . . ." (*Manual,* p. 21) (Emphasis supplied).

It is apparent from the above that the *Manual,* and presumably the Coordinating Committee (which had adopted the *Manual*'s precise language), did not contemplate that the *merits* of document production issues would be decided, or even considered, as part of the "first wave" of discovery in complex multi-district litigation.

> "In the event the petitions are granted, a substantial step forward in the discovery process will have been achieved. Plaintiffs will then be able to *sort out* from the large volume of documents involved *those that are relevant to discovery in their treble damage suits,* and will also be in a position to prepare meaningful and specific motions for the location and production of additional documents." (Emphasis supplied).

Plaintiffs' liaison counsel then recommended "that the Co-Ordinating Committee postpone the issuance of pretrial orders dealing with document production until the aforementioned petitions [to Chief Judge Campbell] have been determined" (*Ibid.*).

Similarly, at the beginning of the Coordinating Committee hearing on April 19, 1968, plaintiffs' liaison counsel acknowledged that plaintiffs had *not* "put forward a Rule 34 motion . . . because we think it is premature. We think that this committee should delay its decisions with respect to what kind of Rule 34 motion is required here until there has been a determination by Chief Judge Campbell" (Tr., pp. 14-15).[10] Subsequently during that hearing, Judge William H. Becker, acting as Chairman of the Coordinating Committee, conceded (in response to a statement by counsel for some of the publisher-defendants) that that hearing *did not* concern the *merits* of document production (Tr., p. 28).

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[10] At the time of the Coordinating Committee hearing, Rule 34 motions had been filed in only two of the several courts in which the damage actions were pending—the Northern District of California and the Eastern District of Pennsylvania. Defendants had no occasion to submit briefs in opposition to those motions, however, and, prior to the Coordinating Committee hearing, orders staying all discovery were entered by both of the courts in which those motions had been filed.

Nevertheless, Judge Becker thereafter engaged one of the counsel for the publisher-defendants (some of the petitioners here) in a brief colloquy pertaining to production of grand jury documents (Tr., pp. 47-51). That colloquy, however, did not include a presentation of any facts upon which either the Coordinating Committee or respondent could properly base a finding that there was "good cause" and "particularized need" which would warrant production of all documents subpoenaed by the grand juries. In fact, at no time during that hearing did counsel for any of the treble-damage plaintiffs even attempt to demonstrate that such "good cause" and "particularized need" existed.

At the conclusion of the hearing, however, Judge Becker announced that the Coordinating Committee would "recommend . . . that the judges [in each district where any of the treble-damage actions was pending] consider making a finding of good cause, which is necessary under Rule 34 for the production" of "the Grand Jury documents in the Government's case which led to the Government's case in Chicago" (Tr., pp. 80-81).

Because the Coordinating Committee recognized that it had no jurisdiction or authority to enter binding discovery orders in any of the pending treble-damage actions, Judge Becker spoke only in terms of *"recommendations"* and *"suggestions"*; he did not indicate that there had been a ruling or a finding that "good cause" had actually been established. In fact, Judge Becker carefully prefaced his remarks with a reference to the fact that he was merely presenting an "informal statement of the recommendations which will be made by the coordinating committee to the judges in which these cases are pending," and he also stated that:

> "suggestions that are made here are simply recommendations, which will be made to the judges for their use in the cases pending before them. Each judge before whom a case is pending, or before whom cases are pending has the power and is encouraged to dispose of the matters pending before him as he deems proper and just under the law, and the rules of civil procedure" (Tr., p. 78).

At the end of the proceedings on April 19, Judge Becker requested that counsel for the parties submit proposed forms of orders reflecting the Committee's oral recommendations. Accordingly, during the ensuing several weeks, counsel for the various parties submitted proposed forms of orders to the Coordinating Committee.[11]

On June 27, 1968, Judge Templar of the Kansas District Court, acting *sua sponte,* entered National Pretrial Order No. 1 exactly as promulgated by the Coordinating Committee. Judge Templar entered the Order without any hearing or any prior notice to counsel (none of whom had previously seen that Order), "pursuant to the [Coordinating Committee's] rulings of April 19, 1968." Paragraph 7 of that Order stated that, "for good cause appearing," defendants were required to produce various categories

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[11] In complying with Judge Becker's request, petitioners' counsel made it clear that they were not waiving their rights with respect to the propriety of any order regarding the production of documents, particularly because no hearing had been held with respect to such an order, and because the treble-damage plaintiffs had not even attempted to establish the existence of "good cause" or "particularized need." Moreover, because of Judge Becker's statement that the Coordinating Committee was merely making "recommendations" and "suggestions" to the various district judges before whom the treble-damage actions were pending, petitioners' counsel anticipated that each of those judges would hold a hearing at which the parties would have an opportunity to show cause why the Coordinating Committee's "recommendations" should be modified or rejected.

of documents, including all documents which had been subpoenaed from them during the grand jury investigations of the publishing industry, as well as the grand jury subpoenas themselves.

On the following day, the Coordinating Committee sent copies of National Pretrial Order No. 1 to all of the treble-damage action district judges (except Judge Templar). The Committee's transmittal letter stated that Judge Templar had already entered that Order, and that the Order "embodies the *rulings* made at the hearing in Kansas City" (Emphasis supplied). The Committee's transmittal letter also "recommended" to each of the district judges:

> "that a pretrial conference be held promptly in the case or cases pending before you at which the enclosed National Pretrial Order No. 1 *will be entered*" (Emphasis supplied).

On Thursday afternoon, July 11, respondent held a brief pretrial conference with respect to proposed National Pretrial Order No. 1. At the beginning of that pretrial conference, respondent's clerk distributed copies of the proposed Order to counsel, many of whom (including plaintiffs' liaison counsel) had not previously seen it and were not aware of its contents. Plaintiffs' liaison counsel then presented several suggestions for expanding the scope of the proposed Order, but defendants' counsel spoke very briefly, and did not argue (or even have an opportunity to argue) the merits of any aspect of the proposed Order. Instead, defendants' counsel suggested that entry of National Pretrial Order No. 1 be deferred, so that if the various treble-damage actions were consolidated before a single judge for pretrial purposes (pursuant to recently-

enacted 28 U.S.C. §1407), all issues regarding discovery could be presented to, and decided by, that judge.[12] Nevertheless, respondent directed the parties to submit their comments on that entire proposed Order by the following day (Friday, July 12), and indicated that he intended to enter that Order on July 16, 1968.

Accordingly, counsel for some of the petitioners who were represented at the pretrial conference submitted their general comments on the proposed Order in a July 12 letter to respondent. In that letter, counsel again asserted that, although the proposed document production involved "serious constitutional and procedural questions," the defendants had never had an opportunity "to brief and adequately argue the question whether the proposed order should require them, wholesale, and without a showing of either relevance or good cause, to produce the grand jury documents for inspection by plaintiffs." Accordingly, counsel again suggested that respondent defer entry of the proposed Order, so that, "if a Section 1407 judge is designated on the recommendation of the Judicial Panel, the question of grand jury documents need be argued only once rather than before eight different district judges."[13]

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[12] 28 U.S.C. §1407 had become effective some time after the April 19 hearing before the Coordinating Committee. Several motions for transfer and consolidation of these treble-damage actions had been submitted to the Judicial Panel appointed pursuant to that statute sometime *before* the Coordinating Committee promulgated its proposed National Pretrial Order No. 1.

[13] Despite the treble-damage plaintiffs' criticism of petitioners' position in this respect (Answer and Supporting Brief, pp. 22-23), that position is entirely consistent with the §1407 Judicial Panel's own statements with respect to the purpose of the new statute:

> "The purpose of Section 1407 as shown independently by its clear language, corroborated by the legislative history, including the reports of the Congressional Committee and of the

Nevertheless, on July 16, 1968, respondent entered National Pretrial Order No. 1 exactly as it had been promulgated by the Coordinating Committee (except for six minor technical changes which had also been approved by the Coordinating Committee) (App. B, *infra*, pp. 3a-8a). That is, respondent ordered the defendants to produce grand jury and other documents, "for good cause appearing," even though at that time:

> (1) no Rule 34 motion had been filed in any of the actions pending before respondent;
>
> (2) none of the plaintiffs in those actions had even attempted to establish the existence of "good cause" and "particularized need" justifying the document production which respondent ordered; and
>
> (3) none of the defendants in those actions had ever had a meaningful opportunity to demonstrate that the requisite "good cause" and "particularized need" did not exist.[14]

On October 17, 1968, all of the then pending treble-damage actions were transferred to respondent for con-

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(n. 13 cont'd)
Judicial Conference, and by testimony before Congress of its authors, makes it clear that its remedial aim is to eliminate the potential for conflicting contemporaneou pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions. The contentions of the City in this case, if sustained, would make possible, and perhaps probable, pretrial chaos in conflicting class action determinations which Section 1407 was designed to make impossible" (Opinion of Judge William Becker in *In Re Multidistrict Private Civil Treble Damage Litigation Involving Plumbing Fixtures,* 1968 CCH Trade Cas. ¶72,671, at p. 86,381 (footnote omitted)).

[14] Many of the petitioners here were not even represented at the July 11 pretrial conference before respondent, because they were not then parties to any action pending before respondent.

solidated pretrial proceedings, in accordance with 28 U.S.C. §1407. The §1407 Judicial Panel's opinion did not discuss the production of documents or any other aspect of discovery in the pending treble-damage actions, but merely noted that the grand jury documents had been impounded in Chicago, and that many of the plaintiffs in the pending treble-damage actions had "applied to the district court for release of" those documents (*In Re Multidistrict Private Civil Treble Damage Litigation Involving Library Editions of Children's Books,* 1968 CCH Trade Reg. Rep. ¶50,217 (Judicial Panel, Oct. 17, 1968)).

On November 1, 1968, respondent indicated that he intended to hold a pretrial conference for the purpose of discussing procedural matters, and he directed the parties to file suggested agendas listing the matters which they believed should be discussed. On November 22, some of the petitioners submitted a proposed agenda, item 5 of which read *in toto* as follows: "Presentation of Motion Requesting a Hearing With Respect to Exhibit E to National Pretrial Order No. 1." On November 27, 1968, however, respondent, in a letter to all counsel, stated that petitioners' request for a hearing with respect to document production would *not* be considered at the forthcoming pretrial conference, because:

> "National Pretrial Order No. 1 decided authoritatively that the documents requested by Exhibit E should be produced" (App. C, *infra,* pp. 9a-11a).

Thereafter, on December 6, petitioners moved respondent to stay all document production pending a hearing concerning plaintiffs' failure to show "good cause" or "particularized need." However, during the presentation

of that motion (by which petitioners merely sought a *hearing* on the merits of the document production), respondent advised petitioners' counsel:

> "I don't think that you are going to be spending your time profitably trying to convince me that there isn't good cause . . ." (Tr., p. 34).

On December 13, respondent denied petitioners' motion for a stay pending a hearing on the document production issue, and also denied their further motion for a stay of the document production pending the filing of a petition for a writ of mandamus in the Court of Appeals (App. D, *infra,* pp. 12a-13a).

On that same day, petitioners filed a petition for a writ of mandamus, accompanied by a motion requesting that the Court of Appeals stay the proposed document production pending a ruling on the mandamus petition (which motion the Court promptly granted). Thereafter, petitioners filed an amended petition for a writ of mandamus on December 20, and a supporting brief on December 23. In those documents, petitioners pointed out that respondent had no proper basis for finding "good cause" or "particularized need" justifying the document production which he ordered; that there had never been an appropriate hearing with respect to that document production; and that respondent's document production orders were *inherently* improper for the following reasons, *inter alia:*

> 1. Those orders authorize, *inter alia,* wholesale disclosure of "each document produced [by the treble-damage defendants] in response to a grand jury subpoena . . . in the course of investigations of the publishing industry," despite the fact that the various

treble-damage actions involve only one aspect of the publishing industry, i.e., library editions of children's books.

2. Those orders do not apply only to companies which were defendants in the treble-damage actions at the time of the Coordinating Committee hearing on April 19, or to companies which were defendants in the treble-damage actions pending before respondent on July 16 (when he entered National Pretrial Order No. 1). On the contrary, the orders apply *automatically to every defendant,* no matter when it first became a party to the treble-damage actions which have been consolidated before respondent pursuant to 28 U.S.C. §1407.

3. Those orders grant every plaintiff access to the documents of *every* company which is a defendant in *any action,* whether or not a particular plaintiff has ever instituted an action, or asserted a claim, against the particular company whose documents it seeks.

On December 26, the Court of Appeals, apparently concluding that petitioners had presented at least a *prima facie* case for mandamus, ordered the filing of an answer "with supporting brief" on or before January 6, 1969. Plaintiffs' liaison counsel filed that Answer and Supporting Brief (which was a single composite document) on January 6.

On January 7, 1969, before counsel for many of the petitioners had even seen that Answer and Supporting Brief, Chicago counsel for several petitioners moved the Court of Appeals for leave to file a reply brief responding to the treble-damage plaintiffs' (1) "significant misleading statements of facts, including erroneous characterizations and descriptions of orders and proceedings in certain trial courts, as well as before the Coordinating Committee For

Multiple Litigation and the present Statutory Section 1407 Panel," and (2) "erroneous constructions of many cases, which are not readily apparent from a reading of the cited portions of those cases."

Nevertheless, on the following day, the Court of Appeals peremptorily denied petitioners' request for leave to file a reply brief, thus precluding petitioners from pointing out the numerous flagrantly misleading and inaccurate statements in the Answer and Supporting Brief (only a few of which are discussed in this petition), and preventing the Court of Appeals from obtaining a complete and accurate description of the facts and the law which might affect its decision.

On January 9, petitioners requested the Court of Appeals to permit oral argument, because the issues involved were "vitally important policy issues which no appellate court has heretofore considered." However, the Court of Appeals, without hearing oral argument (and perhaps even before receiving petitioners' motion for leave to present oral argument), denied the petition for mandamus, stating simply that respondent's order "did not constitute a usurpation of power, *Will* v. *United States*, 389 U.S. 90, 95, and that petitioners have not shown a clear right to the extraordinary writ of mandamus" (App. A, *infra*, pp. 1a-2a).

Reasons for Granting the Writ

Review of the Court of Appeals' decision is clearly warranted, because this case presents exceedingly important issues of first impression concerning the proper administration of justice in multi-party, multi-district litigation

which has been consolidated for pretrial purposes under recently-enacted 28 U.S.C. §1407.

The narrow issue presented by this petition is whether undue emphasis upon considerations of convenience and expediency has deprived petitioners of their rights under the Federal Rules of Civil Procedure and under fundamental principles of due process. The broader issue presented, however, is whether the courts, when administering justice in complex litigation which has been consolidated for pretrial purposes under 28 U.S.C. §1407, can properly ignore traditional procedural safeguards merely to facilitate more convenient and more expedient conduct of the litigation. In enacting 28 U.S.C. §1407, Congress manifestly did not intend to discriminate against litigants involved in complex multi-district litigation, by depriving them of fundamental procedural rights which are guaranteed to litigants in less complex actions. Accordingly, it is essential for this Court to enunciate supervisory guidelines which will insure that the administration of justice under 28 U.S.C. §1407 does not emphasize too much concern for administration, and too little concern for justice to the parties involved.[15]

I.

Manifestly, there is no factual basis in the record upon which respondent could properly predicate a finding that there was "good cause" or "particularized need" for the document production which he ordered. That respondent's actions were based entirely on considerations of convenience and expediency, without regard to petitioners' funda-

[15] The applicable legal principles are discussed in Part II, *infra*, pp. 27-34.

mental due process rights or traditional doctrines of grand jury secrecy, is apparent from a brief summary of the remarkable series of events which preceded respondent's unprecedented document production orders:

1. The grand juries which investigated the publishing industry did not return any indictments, and the complaints in the treble-damage actions (which relate to only one aspect of the publishing industry) are much broader in scope than the complaints in the government civil actions (see *supra,* pp. 4-6).

2. Chief Judge Campbell *denied* the treble-damage plaintiffs' petitions for wholesale disclosure of grand jury documents. Those petitions plainly did not involve or constitute Rule 34 motions for the production of documents, and at no time during the proceedings with respect to those petitions did the treble-damage plaintiffs even attempt to establish "good cause" and "particularized need" for the requested document production (see *supra,* pp. 7-9).

3. Plaintiffs' liaison counsel expressly stated, in a memorandum submitted to respondent, that the treble-damage plaintiffs were seeking to obtain *all* of the documents which the grand juries had subpoenaed, so that they could "sort out from the large volume of documents involved those that are relevant to discovery in their treble damage suits" (see *supra,* pp. 11-12).

4. The Coordinating Committee's hearing to consider a so-called "first wave of discovery" was *not* intended to, and did not, encompass consideration of the merits of document production. Plaintiffs' liaison counsel asserted (both prior to and during the course of that hearing) that it would be "premature" for the Coordinating Committee to consider Rule 34 motions at that time, and the acting Chairman of the Coordinating Committee conceded that the hearing did not concern

the merits of document production (see *supra,* pp. 12-13).

5. Despite the treble-damage plaintiffs' failure to make any affirmative presentation during that hearing with respect to document production, the Coordinating Committee "suggested" and "recommended" that each of the various district judges before whom the treble-damage actions were pending (including respondent) "consider making a finding of good cause, which is necessary under Rule 34 for the production" of "the Grand Jury documents in the Government's case which led to the Government's case in Chicago" (see *supra,* pp. 13-14).

6. Despite the absence of any Rule 34 motion before respondent, any hearing before respondent on the merits of document production, or any factual presentation before respondent with respect to the propriety of any document production, respondent nevertheless found that there was "good cause" for the production of the grand jury and other documents, and he denied petitioners' repeated requests for a hearing with respect to that issue. It is apparent that respondent simply adopted the Coordinating Committee's "recommendations" unquestioningly, without giving adequate consideration to, or permitting the parties to present their views regarding, the propriety of those recommendations and their applicability to the actions pending before him. Moreover, respondent ignored, or was not aware of, the fact that the Coordinating Committee made those "recommendations" *without any factual basis therefor and without an appropriate hearing on the merits of document production* (see *supra,* pp. 15-17).

The impropriety of respondent's orders is highlighted even by the arguments which the treble-damage plaintiffs

presented to the Court of Appeals. For example, in their Answer and Supporting Brief (pp. 39-41), they listed five factors which purportedly demonstrated the existence of "good cause." An analysis of those five factors, however, demonstrates graphically that respondent's orders must have been based solely on considerations of convenience and expediency, because there is nothing else in the record upon which respondent could possibly have predicated a "finding" that "good cause" existed. Thus,

1. The entry of consent decrees in government civil actions has no bearing on treble-damage plaintiffs' *need for, or right to,* documentary production in their own private actions. This is particularly obvious in the instant situation, because the complaints in the treble-damage actions are far broader in scope than the complaints in the government civil actions, and because *most* of the defendants in the treble-damage actions were not parties to the government civil actions or to the consent decrees in those actions (see *supra,* pp. 5-6).

2. The fact that the Antitrust Division had possession of the documents which were subpoenaed by grand juries investigating the publishing industry likewise has no bearing on the existence of "good cause." The Antitrust Division always collects subpoenaed documents during the course of grand jury investigations, but the mere convenience provided by that "assembly of documents" surely does not warrant wholesale disclosure of those grand jury documents to treble-damage claimants for discovery purposes. Moreover, the treble-damage plaintiffs' naked, unsupported assertion that the assembled grand jury documents are "relevant, material and essential" to the prosecution of their actions manifestly does not constitute a sufficient shewing of "good cause." The mere fact

that certain documents were subpoenaed by grand juries investigating the entire publishing industry does not make those documents *ipso facto* relevant or material to treble-damage actions which involve only one facet of that industry.

3. Moreover, the fact that "a multitude of treble damage actions" has been instituted, or that numerous parties are involved, surely does not justify entry of document production orders in utter disregard of Rule 34's expressly stated "good cause" requirement, particularly in view of this Court's recognition that the "good cause" requirement is "not a mere formality, but is a plainly expressed limitation on the use of that Rule." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 118 (1964) (discussed *infra*, pp. 28-29). Nor is there any basis for the treble-damage plaintiffs' unsupported assertion that the private actions are "in large part based upon the federal investigation and complaints" (see *supra*, pp. 5-6). Even if that were true, however, there is no logical reason why that would justify wholesale disclosure of grand jury documents to private litigants for discovery purposes.

4. Nor are the treble-damage plaintiffs somehow exempted from the "good cause" requirement of Rule 34 simply because they are public bodies. It is beyond dispute that the Federal Rules of Civil Procedure apply with equal force to *all* litigants, including even the United States.

5. Finally, the existence of a "strong public policy to aid treble damage claimants" surely does not render the "good cause" requirement inapplicable to private treble-damage actions, nor does it confer upon private treble-damage claimants any special right to invade the traditionally secret files of grand juries for discovery purposes.

The treble-damage plaintiffs' assertion that those five clearly irrelevant factors establish "good cause" demonstrates beyond question that respondent's orders were not based upon the existence of any "special circumstances [which] make it essential to the preparation of the moving party's case that the desired information be made available to him." *Williams* v. *Continental Oil Co.*, 215 F. 2d 4, 7 (10th Cir. 1954) (discussed *infra*, p. 29). *A fortiori*, the treble-damage plaintiffs have failed to establish the "particularized need" which would warrant granting them access to traditionally secret grand jury proceedings.

Thus, it is abundantly clear, even from the arguments which the treble-damage plaintiffs themselves have advanced, that respondent's document production orders resulted from an improper reliance upon considerations of convenience and expediency, in utter disregard of petitioners' rights and of the principles which govern discovery in federal civil actions (discussed *infra*, pp. 28-31).

II.

The Court of Appeals' order denying the petition for a writ of mandamus[16] (App. A, *infra*, pp. 1a-2a) is at odds with this Court's decisions that mandamus should be invoked in cases where lower courts have displayed a persistent disregard of the Federal Rules of Civil Procedure. For example, in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964) and in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957), this Court held that such conduct constituted a "clear abuse of discretion" and "usurpation of judicial power" which warranted the issuance of writs of mandamus.

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[16] As indicated *supra* (p. 4, n. 2), mandamus was the only remedy by which petitioners could protect their rights.

Under the facts and circumstances detailed above, issuance of the requested writ clearly is justified because respondent has completely disregarded the procedural rules and the precedents which govern discovery proceedings in federal civil actions. Respondent issued those document production orders:

(1) without any Rule 34 motion pending before him;

(2) without any attempt by plaintiffs in the treble-damage actions to demonstrate that there was "good cause" or "particularized need" for the document production ordered;

(3) without any proper basis upon which to predicate a finding that the treble-damage plaintiffs had established the "good cause" or "particularized need" required by Rule 34 and by applicable legal precedents;

(4) without any justification for violating the veil of secrecy which traditionally protects grand jury proceedings; and

(5) without an appropriate hearing regarding the existence of "good cause" and "particularized need," thus clearly depriving petitioners' of their fundamental due process rights.

Rule 34 authorizes production of documents *only* "upon motion of any party showing good cause therefor and upon notice to all other parties, . . . " (App. F, *infra,* p. 15a). The "good cause" requirement of Rule 34 has been applied quite stringently over the years, because the courts have recognized that a litigant should not be permitted access to an opposing party's documents without substantial justification. In fact, as this Court noted in *Schlagenhauf* v. *Holder,* 379 U.S. 104, 117-118 (1964), the stringent "good cause" requirement does not apply

generally to *all* categories of discovery under the Federal Rules of Civil Procedure; on the contrary, "good cause" is a prerequisite to discovery *only* under Rule 34 (which relates to production of documents) and Rule 35 (which relates to physical and mental examinations of parties). In the *Schlagenhauf* case, this Court pointed out that the law is well-settled that the "good cause" requirement of Rule 34 "is not a mere formality, but is a plainly expressed limitation on the use of that Rule" (*Ibid*).

That is, the "good cause" requirement cannot be satisfied by a mere showing that the requested materials are relevant. On the contrary, "in each case the question is whether special circumstances make it essential to the preparation of the moving party's case that the desired information be made available to him." *Williams* v. *Continental Oil Co.*, 215 F. 2d 4, 7 (10th Cir. 1954). To the same effect, see *Guilford National Bank* v. *Southern R. Co.*, 297 F. 2d 921, 924-925 (4th Cir. 1962); *Hauger* v. *Chicago R. I. & Pac. R.R.*, 216 F. 2d 501 (7th Cir. 1954); *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (D.C. Cir. 1948); *Alltmont* v. *United States*, 177 F. 2d 971 (3rd Cir. 1950).

Accordingly, Rule 34 motions for production of documents will not be granted "merely to serve the convenience of counsel, or as reassurance that counsel has overlooked nothing, or on a mere hope that the documents sought may be useful to the moving party" (2A Barron and Holtzoff, *Federal Practice and Procedure*, pp. 426-428 (Wright ed. 1961)). Instead, the movant must demonstrate that there are some "special circumstances" which make it essential that an opposing party's private documents be disclosed. And, as Judge Wortendyke said in denying a Rule 34 motion for production of all documents which the govern-

ment had obtained "through seizure or process in the course of the Federal Grand Jury investigation," Rule 34 "does not contemplate that a party may obtain a permit to explore the documents in the possession of his adversary in the hope that he may find something that may adversely affect the adversary's case, or that may prove helpful to the case of the movant." *United States* v. *Becton, Dickinson and Co.*, 30 F.R.D. 132, 134 (D. N.J. 1962).

Moreover, this Court repeatedly has insisted that the "indispensable secrecy of grand jury proceedings . . . must not be broken except where there is a compelling necessity," and, therefore, that a litigant seeking to pierce the traditional veil of grand jury secrecy must satisfy an *even more stringent* test by demonstrating "particularized need" —i.e., something more than the mere "relevancy and usefulness" of the information sought. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-683 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399-400 (1959). In addition, the courts consistently have held that wholesale disclosure of grand jury proceedings for purposes of civil discovery is inconsistent with the traditional functions of the grand jury, and that discovery is not a purpose which properly warrants disclosure of grand jury proceedings. See, e.g., *In Re April 1956 Term Grand Jury*, 239 F. 2d 263, 271-272 (7th Cir. 1956) (documents subpoenaed by a grand jury could not properly be utilized by agents of the U.S. Treasury Department in connection with civil proceedings); *In Re Holovachka*, 317 F. 2d 834, 836-838 (7th Cir. 1963) (the Indiana Attorney General and the Disciplinary Commission of the Indiana Supreme Court could not obtain grand jury minutes for use in a pending disbarment proceeding, because "the convenience of

discovery . . . has never been regarded as sufficient cause to lift the secrecy of grand jury proceedings"); *Continental Baking Co.* v. *United States,* 281 F. 2d 137, 148 (6th Cir. 1960); *Application of State of California,* 195 F. Supp. 37, 39-41 (E.D. Pa. 1961) (treble-damage plaintiffs denied access to grand jury materials, including grand jury subpoenas and witness lists); *United States* v. *Stein,* 18 F.R.D. 17, 19-20 (S.D.N.Y. 1955) (denying motion for pretrial production of "all . . . documents and papers presented to the Grand Jury," because "Secrecy of Grand Jury proceedings may not be violated either directly through inspection of the Grand Jury minutes, . . . or indirectly by disclosure of the documentary evidence presented to it"). See also *Maryland & Virginia Milk Producers Association, Inc.* v. *United States,* 250 F. 2d 425 (D.C. Cir. 1957) (because all documents subpoenaed by a grand jury are not necessarily relevant to a subsequent related government civil action, government counsel in such a civil action are permitted to use *only* those of the grand jury documents which they could properly have obtained through a Rule 34 motion, by making an appropriate showing of "good cause").

The treble-damage plaintiffs' Answer and Supporting Brief in the Court of Appeals cites no contrary legal precedents or authority which would support respondent's order. In fact, petitioners are completely in accord with the principle relied on most heavily in that Answer and Supporting Brief—namely, that traditional concepts of grand jury secrecy do not apply when documents are sought "for their intrinsic value," rather than to learn what occurred before a grand jury (Answer and Supporting Brief, p. 51). That principle has no bearing on this proceeding, however, be-

cause the treble-damage plaintiffs here manifestly are *not* seeking documents "for their intrinsic value." On the contrary, they are seeking discovery of all documents which the grand juries subpoenaed, *precisely because those documents were subpoenaed by the grand juries.* This fact has been admitted by plaintiffs' liaison counsel, who stated that his "primary interest is to secure from the government . . . the results of its investigations, . . . the documents it has collected, and the statements it has prepared," and also that "a substantial step forward in the discovery process will have been achieved [if] plaintiffs [are] . . . able to sort out from the large volume of documents [obtained by the Antitrust Division] those that are relevant to discovery in their treble damage suits" (*supra,* pp. 6, 12).

Moreover, none of the cases cited by the treble-damage plaintiffs justifies the wholesale disclosure of grand jury documents which respondent has ordered. For example, in *United States* v. *Interstate Dress Carriers, Inc.,* 280 F. 2d 52 (2nd Cir. 1960) (Answer and Supporting Brief, pp. 52-53), the ICC's desire to inspect certain records which a grand jury had subpoenaed from Interstate had *nothing* whatsoever to do with the fact that those records had been subpoenaed by a grand jury. On the contrary, as Chief Judge Lumbard's opinion pointed out, the ICC sought the documents for use in its own "lawfully authorized," and entirely unrelated, investigation; the documents merely "happened to be in the control of the grand jury" at the time when the ICC requested them. The Court of Appeals expressly stated that, although "documents as well as oral testimony may come within [the] proscription against disclosure" of grand jury proceedings, the ICC (unlike the treble-damage plaintiffs here) had clearly demon-

strated its "independent legal authority for the inspection" of the documents, which authority was entirely unrelated to the grand jury's interest in those documents.

In Re Hearings before the Committee on Banking and Currency of the United States Senate, 19 F.R.D. 410 (N.D. Ill. 1956) (Answer and Supporting Brief, pp. 54-55), presented a similar factual situation. There, a Senate committee had requested access to a *specific ledger* which merely happened to be in the possession of the grand jury at the time of the request, and the Senate committee had *independent legal authority* for its inspection of that ledger. Accordingly, Judge Sullivan's decision granting the committee's request was simply a holding that the mere presence of the ledger in the hands of the grand jury did not preclude the Senate committee (1) from obtaining a copy of that ledger from the individual who owned it (or from his representative), or (2) from inspecting the original of the ledger, which was still in the possession of the grand jury.

By contrast, the treble-damage plaintiffs here are seeking production of the grand jury documents *solely because the grand juries subpoenaed those documents.* Respondent's orders require the production of "each document produced [by treble-damage defendants] in response to a grand jury subpoena . . . in the course of investigations of the publishing industry." The treble damage plaintiffs, however, have made no effort (1) to identify those documents in any other manner, (2) to demonstrate how many of those documents are "relevant, material and essential" to any of the pending treble-damage actions, or (3) to show that they

have "independent legal authority for the inspection" of those documents.[17]

Finally, the treble-damage plaintiffs have attempted to convey the false impression that the unprecedented type of document production which respondent has ordered in fact is an ordinary, commonplace and frequently granted form of discovery. Nothing could be further from the truth, however, despite plaintiffs' assertions that such wholesale disclosure of grand jury documents "has become standard procedure in treble damage cases involving public agencies," and that "in many recent multiple antitrust proceedings . . . district courts—without discussion or opinion—have directed the production of documents previously submitted to the Government as a result of grand jury subpoenas" (Answer and Supporting Brief, p. 56). Although the treble-damage plaintiffs cited seven unreported cases in support of those assertions, none of those cases even remotely resembles the instant proceeding. In each instance the parties whose documents were being sought *did not object, or withdrew their objections,* to producing the documents sought. It is, therefore, not at all surprising that the various courts entered those orders "without discussion or opinion."[18]

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[17] *In the Matter of Grand Jury Proceedings (General Dynamics Corp.)* 1961 CCH Trade Cas. ¶70,027 (S.D.N.Y. 1961), also relied on by the treble-damage plaintiffs in this connection (Answer and Supporting Brief, pp. 55-56), is clearly inapposite. That case involved *defendants in a pending criminal contempt action* who were seeking access to the grand jury documents which government counsel were using in connection with the prosecution of that action.

[18] The seven cases cited by the treble-damage plaintiffs are: (1) *State of Illinois* v. *Pennsalt Chemical, et al.* (N.D. Calif., No. 46550); (2) *Illinois Public Service Co.* v. *Aluminum Co. of Amer-*

In short, none of the authorities cited in the Answer and Supporting Brief justify respondent's document production orders in view of the treble-damage plaintiffs' failure to demonstrate either "good cause" or "particularized need," as required by this Court's decisions.

CONCLUSION

This petition presents extremely significant questions of first impression with respect to the proper administration of justice in complex multi-district litigation consolidated for pretrial proceedings under recently-enacted 28 U.S.C. §1407. Because this Court's guidance is necessary to insure the protection of litigants' rights in these circumstances, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HORACE S. MANGES
IRA M. MILLSTEIN
DONALD J. WILLIAMSON
A. PAUL VICTOR
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for:
Harper & Row Publishers, Inc.
Grosset & Dunlap, Inc.
Charles Scribner's Sons
E. P. Dutton & Company, Inc.
Henry Z. Walck, Inc.

H. TEMPLETON BROWN
LEE N. ABRAMS
MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
231 South La Salle Street
Chicago, Illinois 60604
Attorneys for:
William Morrow & Company, Inc.

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ica (N.D. Ill., No. 65 C 1643); (3) *Chicago Transit Authority* v. *United States Steel Corporation, et al.* (N.D. Ill., No. 66 C 1487); (4) *State of Illinois* v. *Brunswick Corporation, et al.* (N.D. Ill., No. 62 C 451); (5) *State of Illinois* v. *Sperry Rand Corporation, et al.* (N.D. Ill., No. 65 C 1549); (6) *Eastland Construction Co.* v. *American Radiator & Standard Sanitary Corp.* (N.D. Calif., No. 46162 and related cases); (7) *East Bay Municipal Utility District* v. *Kaiser Steel Corp.* (D. Hawaii).

W. Donald McSweeney
William A. Montgomery
Schiff Hardin Waite
Dorschel & Britton
231 South La Salle Street
Chicago, Illinois 60604
Attorneys for:
The Bobbs-Merrill Company, Inc.
G. P. Putnam's Sons
The Viking Press, Inc.

Earl A. Jinkinson
John W. Stack
Winston, Strawn, Smith & Patterson
1400 First National Bank Building
Chicago, Illinois 60603
Attorneys for:
Franklin Watts, Inc.

Conrad W. Oberdorfer
Choate, Hall & Stewart
28 State Street
Boston, Massachusetts 02109
Attorney for:
Houghton Mifflin Co.

Robert W. Bergstrom
Stephen M. Slavin
Bergstrom & Olson
39 South La Salle Street
Chicago, Illinois 60603
Attorneys for:
Follett Library Book Company

David P. List
Kenneth A. Manaster
Leibman, Williams, Bennett, Baird & Minow
208 South La Salle Street
Chicago, Illinois 60604
Attorneys for:
The American News Company

Samuel Weisbard
David L. Porter
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603
Attorneys for:
Golden Press, Inc.

Bella L. Linden
David Blasband
Linden & Deutsch
529 Fifth Avenue
New York, New York 10017
Attorneys for:
The Macmillan Company

John J. McHugh
Chadwell, Keck, Kayser, Ruggles & McLaren
135 South La Salle Street
Chicago, Illinois 60603
Attorney for:
Charles M. Gardner Co.

Bruce A. Hecker
Leon P. Gold
Shea, Gallop, Climenko & Gould
330 Madison Avenue
New York, New York 10017
Attorneys for:
Campbell & Hall, Inc.

Edgar E. Barton
Kevin L. Carroll
White & Case
14 Wall Street
New York, New York 10005
Attorneys for:
McGraw-Hill, Inc.

EARL E. POLLOCK
ALAN H. SILBERMAN
SONNENSCHEIN, LEVINSON,
CARLIN, NATH & ROSENTHAL
69 West Washington Street
Chicago, Illinois 60602
Attorneys for:
Baker & Taylor Co.

FRED BARTLIT
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
2900 Prudential Plaza
Chicago, Illinois 60601
Attorney for:
Children's Press, Inc.

LEO ROSEN
GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022
Attorney for:
Thomas Y. Crowell Company
David McKay Co., Inc.

February, 1969

JOHN C. CHRISTIE, JR.
BELL, BOYD, LLOYD,
HADDAD & BURNS
135 South La Salle Street
Chicago, Illinois 60603
Attorney for:
E. M. Hale and Company

WILLIAM E. STOCKHAUSEN
SATTERLEE, WARFIELD & STEPHENS
277 Park Avenue
New York, New York 10017
Attorney for:
Holt, Rinehart and Winston, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

January 9, 1969

Before:

Hon. ROGER J. KILEY,
Circuit Judge

Hon. LUTHER M. SWYGERT,
Circuit Judge

Hon. WALTER J. CUMMINGS,
Circuit Judge

No. 17320

HARPER & ROW PUBLISHERS, INC., *et al.*,
Petitioners,

—VS.—

HONORABLE BERNARD M. DECKER,
United States District Judge,
Respondent.

ORDER

On December 13, 1968, petitioners filed in this court their Original Petition for a Writ of Mandamus seeking

to expunge respondent's order of December 13, 1968, compelling production of certain documents in a district court proceeding. Simultaneously, petitioners filed a motion for stay of execution of the district court order. This court on December 13, 1968, entered the stay order.

On December 20, 1968, petitioners filed their Amended Petition for Writ of Mandamus, and thereafter, pursuant to this court's order, filed their brief in support of the Amended Petition. On December 26, 1968, this court ordered respondent to answer the petition, "with supporting brief," on or before January 6, 1969. Respondent's Answer to Petition for Writ of Mandamus with Supporting Brief was filed January 6, 1969.

On consideration of the Amended Petition for Mandamus and the respondent's Answer, and being fully advised, the court finds that the entry of the order of December 13, 1968, in the district court for production of documents did not constitute a usurpation of power, *Will* v. *United States*, 389 U.S. 90, 95, and that petitioners have not shown a clear right to the extraordinary writ of mandamus.

IT IS THEREFORE ORDERED that the Amended Petition for Mandamus be and it is hereby denied.

IT IS FURTHER ORDERED that respondent's request for allowance of attorneys' fees be and it is hereby denied.

A True Copy:
Teste:

KENNETH J. CARRIDE
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

APPENDIX B

In pertinent part, Judge Decker's July 16, 1968 Order provided as follows:

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 67 C 1899

STATE OF ILLINOIS,

Plaintiff,

—VS.—

HARPER & ROW, PUBLISHERS, INC., *et al.,*

Defendants.

No. 67 C 1906

STATE OF WEST VIRGINIA,

Plaintiff,

—VS.—

HARPER & ROW, PUBLISHERS, INC., *et al.,*

Defendants.

Order Granting Leave to Plaintiffs and Defendants to Propound Interrogatories and Ordering Production of Documents by Defendants

(National Pretrial Order No. 1)

A pretrial conference having been held on July 11, 1968, and counsel having been heard, and due deliberation having been had, it is ordered, severally in each of the above actions, that:

* * * * *

(7) *Production of Documents by Defendants*:

(a) *Production of Documents*: For good cause appearing, it is hereby ordered that each of the defendants shall, on or before December 15, 1968, produce and deposit with the Clerk of this Court, or in a document depository as hereinafter provided, the original or legible photocopies of each of the documents described in Exhibit E annexed hereto;

* * * * *

Enter:

Bernard M. Decker
United States District Judge.

Dated: July 16, 1968.

EXHIBIT E

PRODUCTION OF DOCUMENTS BY DEFENDANTS

I. Definitions

A. As used herein, "document" includes any written, printed, typed, recorded or graphic matter however produced or reproduced, prepared during or referring or relating, unless otherwise specified, to the period from January 1, 1959 to April 18, 1967, concerning the products defined in the complaint (unless otherwise specified), now in the possession, custody or control of the defendant companies, including documents at any time in the possession, custody or control of their domestically domiciled subsidiaries or merged or acquired predecessors.

B. As used herein, the term "the products defined in the complaint" or "library books" shall mean library books as defined in the complaints or as defined in defendants' answers to Plaintiffs' First Set of Interrogatories to Defendants (Exhibit A of the annexed Order).

C. As used herein, "interrogatories" mean plaintiff's first set of interrogatories and "answers" mean answers of the respective defendants to those interrogatories.

D. As used herein, "you" or "your", unless otherwise specified, means the defendant corporation producing the documents requested herein, its subsidiaries and predecessors, its present and former officers, executives, directors, agents and employees and all other persons acting or purporting to act on behalf of the defendant corporation or its subsidiaries or predecessors.

II. Time Period

The discovery called for herein refers to the period from January 1, 1959 through April 18, 1967. Documents prepared subsequent to the foregoing period but which relate or refer thereto or to any portion thereof are to be included.

III. Documents to Be Produced by All Defendants

1. Each document produced in response to a grand jury subpoena in the Northern District of Illinois, Eastern Division in the course of investigations of the publishing industry and in particular library editions of children's books, and copies of the grand jury subpoenas themselves, including the documents produced by defendant and/or copies of documents produced by others in the defendant's custody or control.

2. All existing lists or other identifying descriptions, prepared by any defendant, of documents furnished to any officer or agency of the United States or of any state or municipal government in connection with any legislative, administrative or judicial investigation, hearing or proceeding involving the pricing or marketing of the products defined in the complaint and copies of each subpoena and other written request pursuant to which such documents were furnished.

3. Each document taken or received or prepared at any meeting (which meeting and which document relate to prices, bids, terms and conditions of sale, or allocation of markets) attended by any person employed by you having pricing responsibility and by any person employed by any other defendant or alleged co-conspirator named in the

complaint herein during the period from January 1, 1959 to April 18, 1967.

4. During the period from January 1, 1959 to April 18, 1967 all circular letters and all market letters, reports, bulletins, instructions or other documents of general circulation among defendant's salesmen or other persons having pricing or sales responsibility concerning explanations for changes in prices, price adjustment clauses, terms of payment, or relating to technical or quality changes of payment, or relating to technical or quality changes with respect to the product defined in the complaint.

5. All documents during the period from January 1, 1959 to April 18, 1967 relating to investigations made by defendants or persons employed by defendants of alleged violations by it or its employees of the antitrust laws of the United States or of the company's written policy prohibiting employees to meet with competitors to discuss prices of the product defined in the complaint, including reports of interviews with persons employed by the company at any time; and documents relating to recommendations or actions in dealing therewith.

6. Such charts or other documents as will show the organization, and changes therein, of the defendant during the period January 1, 1959 through April 18, 1967.

7. Each document referring or relating to or reflecting the specific circumstances under which you obtained notification of actual or proposed price changes of your competitors or obtained possession of price catalogs, price sheets, price lists or other documents setting forth prices or terms and conditions of sale of your competitors.

8. The personal and company copy of each expense account, travel voucher and supporting documents, diary, appointment note, appointment book, calendar pad, letter book or file, and telephone call memorandum, for each officer and employees with pricing authority and his immediate assistants.

A True Copy Attest

ELBERT A. WAGNER, JR., *Clerk*

By: JOHN BORRIS
Deputy Clerk
U. S. District Court, Northern
District of Illinois

Date: Jan. 21, 1969

APPENDIX C

UNITED STATES DISTRICT COURT

Chicago 60604

November 27, 1968.

To: All Attorneys of Record.

Re: *State of Illinois* v. *Harper & Row Publishers, Inc., et al.—No. 67 C 1899, and Related Cases.*

Gentlemen:

You are hereby notified that a pretrial will be held in this consolidated action in Courtroom 2141 at 10:30 A.M. on Friday, December 13, 1968. At said pretrial, the matters noted in the agenda attached hereto as Exhibit A will be discussed in the order set forth in said agenda.

In addition, several matters require your attention prior to the pretrial. The parties should present to the court a written list of all pending motions relating to jurisdiction and venue by December 6th. Similarly, a separate enumeration of all other pending motions shall also be submitted by December 6th. Motions not included on these lists will be considered abandoned. All additional motions which should be considered at this stage in the litigation shall be filed no later than December 6, 1968.

Moreover, the parties should present a service list of attorneys at the pretrial, not to exceed one lawyer for each party, regardless of the number of actions in which

said party is named. The list will be used for mailing notices. Prior to the pretrial, plaintiffs' attorneys and defendants' attorneys shall confer separately and select one or two members to act as liaison counsel for each side. Such counsel should be authorized by stipulation to (1) act as spokesmen at pretrial conferences, and (2) receive notices on behalf of all counsel, arrange for the necessary reproduction of notices, and send copies to the attorneys on the service list.

Very truly yours,

/s/ BERNARD M. DECKER
United States District Judge

Attached to the foregoing letter was an Exhibit A which contained the following pertinent language:

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 67 C 1899

STATE OF ILLINOIS, *et al.*,

Plaintiffs,

—VS.—

HARPER & ROW PUBLISHERS, INC., *et al.*,

Defendants

AND RELATED CASES.

EXHIBIT A

* * * * *

II. ITEMS NOT ON THE AGENDA

1. EXHIBIT E. National Pretrial Order No. 1 decided authoritatively that the documents requested by Exhibit E should be produced. Plaintiffs will be allowed to copy the grand jury documents presently held by the government but may not remove them.

* * * * *

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No. 67 C 1899 December 13, 1968.

STATE OF ILLINOIS

v.

HARPER & ROW PUBLISHERS, INC., *et al.*,
and Related Cases

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

ORDER

Section 7(a) of National Pretrial Order No. 1 is hereby supplemented as follows:

"For good cause appearing, each plaintiff may, on or after December 16, 1968, inspect and copy the documents described in exhibit E which are now in the custody of the antitrust division of the Justice Department. These documents shall be subject to the

same restrictions which are outlined in section 7(b). Defendants may claim confidentiality and privilege by filing a list of such restricted documents with the clerk of the court by December 16, 1968."

Furthermore, as indicated in open court, prior to December 23, 1968, plaintiffs' attorneys will refrain from disclosing the information in all documents, thus granting the defendants additional time in which to specify the documents which are confidential or privileged.

Finally, defendants' motion for a stay of section 7 of this court's July 16, 1968 order, as amended by the preceding paragraphs, is denied. The question of "good cause" was fully considered by (1) the Coordinating Committee for Multidistrict Litigation, which held a hearing in Kansas City on April 19, 1968, and (2) this court, both prior to its July 16, 1968, ruling and again on December 6, 1968, when defendants' motion was briefed and reargued.

ENTER:

/s/ BERNARD M. DECKER
United States District Judge

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1968

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

VS.

BERNARD M. DECKER, United States District Judge, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners, and of the opposition of the respondents thereto,

IT IS ORDERED that Section 7 of the order of the United States District Court for the Northern District of Illinois, of July 16, 1968, be, and the same is hereby, stayed providing a petition for a writ of certiorari in the above-entitled cause is filed in this Court on or before February 10, 1969. Should such petition be so filed, this stay is to remain in effect pending the Court's action on the petition. In the event the petition for a writ of certiorari is denied, this stay is to terminate automatically. Should the petition for a writ of certiorari be granted, this stay is to continue pending the issuance of the judgment of this Court.

THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States.

Dated this 18th
day of January, 1969.

APPENDIX F

Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 34, provides that:

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

* * * * *

28 U.S.C. §1407 provides as follows:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.

Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

"(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

"(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

"The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the

district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

"(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

"(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders susbequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

"(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

"(g) Nothing in this section shall apply to any action in which the United States is a complainant aris-

ing under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

Added Pub.L. 90–296, § 1, Apr. 29, 1968, 82 Stat. 109."

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 14 1969
JOHN F. DAVIS, CLERK

No. 1034

In the

Supreme Court of the United States

OCTOBER TERM, 1968

HARPER & ROW PUBLISHERS, INC., et al.,
Petitioners,

vs.

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

LEE A. FREEMAN
One North LaSalle Street
Chicago, Illinois 60602

(Additional counsel for respondents
listed on next page)

The Scheffer Press, Inc.—ANdover 3-6850

WILLIAM J. SCOTT
Attorney General
State of Illinois

CRAWFORD C. MARTIN
Attorney General
Thomas W. Mack
Assistant Attorney General
State of Texas

THEODORE L. SENDAK
Attorney General
Richard C. Johnson
Chief Counsel
State of Indiana

RAYMOND F. SIMON
Corporation Counsel
City of Chicago

J. LEE RANKIN
Corporation Counsel
City of New York

HAROLD E. KOHN
David Berger
Special Counsel
City of Philadelphia, et al.

JOHN A. MURRAY
Attorney for
City of St. Paul, et al.

DAVID J. YOUNG
Attorney for Archbishop
and Bishops of the Six
Dioceses in Ohio

PAUL W. BROWN
Attorney General
Donald Weckstein
Assistant Attorney General
State of Ohio

CHAUNCEY H. BROWNING, JR.
Attorney General
Benjamin F. Yancey, Jr.
Assistant Attorney General
State of West Virginia

MAXWELL M. BLECHER
Special Counsel
States of Hawaii,
Washington, Oregon, et al.

JOHN B. BRECKENRIDGE
Attorney General
Charles N. Henson
Assistant Attorney General
State of Kansas

ROBERT W. WARREN
Attorney General
George F. Sieker
Assistant Attorney General
State of Wisconsin

DOUGLAS M. HEAD
Attorney General
Roger E. Montgomery
Assistant Attorney General
State of Minnesota

LOUIS J. LEFKOWITZ
Attorney General
State of New York

Attorneys for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1034

HARPER & ROW PUBLISHERS, INC., et al.,
Petitioners,

vs.

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition is filed on behalf of the Honorable Bernard M. Decker, United States District Judge, respondent, and on behalf of all plaintiffs in the treble damage antitrust suits now pending in the District Court for the Northern District of Illinois, entitled *State of Illinois* v. *Harper & Row Publishers, Inc.*, No. 67 C 1899 and related cases.

Opinion Below

The unreported opinion of the Court of Appeals and the order entered by the District Court on July 16, 1968, are printed, in relevant part, in Appendices A and B of the Petition.

Question Presented

Whether the District Court's discovery order for the production of documents constituted a clear abuse of discretion requiring the issuance of a writ of mandamus by the Court of Appeals.

STATEMENT OF THE CASE

The petitioners have substituted the repetition of pejoratives and unfounded accusations for legal argument. Their statement of facts neglects or distorts certain crucial events in the children's books antitrust proceedings, and omits controlling admissions and concessions made on behalf of the petitioners by their spokesmen. At the outset, therefore, respondents wish to supplement and correct the record.

The Pending Treble Damage Actions

Treble damage antitrust suits have been filed by attorneys general for the States of Illinois, West Virginia, Kansas, Oregon, Washington, Hawaii, Indiana, Ohio, New York, Minnesota, Alaska, Michigan, and Texas, and by corporation counsel for the Cities of Chicago, New York, Philadelphia, St. Paul, San Francisco, San Diego, Los Angeles, and others, in federal district courts throughout the nation.[1] These suits have been brought on behalf of

[1] More than thirty-five separate suits have been filed in eight judicial districts.

the many thousands of public school districts and tax supported public libraries located in each of the respective states and municipalities.

All of these treble damage actions arise out of a federal grand jury investigation, and are based in large part on the same unlawful price fixing conspiracies charged in federal civil actions which were instituted in the Northern District of Illinois against eighteen publishers of library editions of children's books.

Federal Antitrust Proceedings

The Government's civil actions were filed in April 1967, and assigned to Judge Marovitz. The complaints charged a price fixing conspiracy resulting in high, artificial, and non-competitive price levels in the sale of children's books —largely to state and local governmental bodies.

Before hearings, on October 23, 1967, the Government and defendants filed stipulations providing for consent dismissal of the actions upon an undertaking by the publishers not to price fix for the next five years. Many of the state and municipal agencies here involved as respondents sought to intervene[2] for the purpose of:

a) objecting to the entry of consent judgments without an admission or determination of guilt; and

b) preserving the identity and integrity of documents in the possession, control, and custody of the Antitrust Division until the entry of an appropriate discovery order.

Judge Marovitz heard full argument, and before entering the consent judgments he secured agreement from

---

[2] Denial of the petition to intervene was affirmed in *City of New York* v. *United States,* 390 U.S. 715 (1968).

the Government and defendants to an order impounding all documents involved until the further order of the Chief Judge of the District Court for the Northern District of Illinois. This order, entered on November 20, 1967, recites in part:

> "* * * that motions have been or may be made in these treble damage actions for the production of documents, grand jury subpoenas, and grand jury testimony presently in the possession of plaintiff; and that it is in the public interest that these documents, grand jury subpoenas, and grand jury testimony be identifiable and preserved and remain together for possible use in these treble damage actions."

The Petition to Chief Judge Campbell

Chief Judge Campbell, as supervisor of the grand jury proceedings, was then petitioned by the attorneys general of eight states and the corporation counsel of four major cities for an order permitting inspection and copying of:

a) all documents in the possession of the Antitrust Division resulting from its investigation of violations of the antitrust laws in the sale of children's books; and

b) grand jury subpoenas issued, and the names of witnesses who appeared in connection with that investigation.

The petition recited that:

1. Many treble damage actions had been filed in several judicial districts by public officials on behalf of many thousands of schools and public libraries—"based in large part on the same unlawful price-fixing conspiracies charged in the federal civil actions."

2. The Antitrust Division had possession and custody of documents secured by subpoenas or investigation which "are material, relevant and essential to prove

the price-fixing conspiracies charged in petitioners' pending treble damage actions."

3. In several treble damage actions, Rule 34 motions had already been filed seeking the production of grand jury documents for inspection and copying.

4. A single order from the Chief Judge who impaneled the grand juries "will effect uniformity in the administration of justice and certainty and simplification of procedure for a multitude of interested parties."

5. A single inspection and copying by a committee representing all of the involved public officials "will result in substantial economy of time and money for the courts, the Antitrust Division of the Department of Justice and all interested parties, including the many involved school districts and public libraries which are already heavily financially burdened."

6. Public policy as announced by Congress and emphasized by the United States Supreme Court seeks to promote and aid antitrust treble damage claimants as the "surest weapon for enforcement" of the antitrust laws.

The petition concluded that "for good cause shown by the facts stated herein" the documents should be ordered produced for inspection.

The publisher defendants filed a brief in opposition to the petition. They stated that Rule 34 motions had been filed in several related treble damage actions, but Judge Harris, of the Northern District of California, had entered stay orders "pending consideration of action by the Judicial Coordinating Committee for Multiple Litigation," and that stay orders were similarly entered by district courts in Philadelphia, Madison, and Boston. The defendants then argued:

"In an effort to justify interference with those courts' management of the pending damage actions, petitioners contend that this proceeding is an attempt to avoid 'a multiplicity' of similar Rule 34 motions in different forums, ostensibly in order to achieve 'judicial efficiency, economy and uniformity of decision'. . . . It is respectfully submitted, however, that this Court should permit the Judicial Coordinating Committee for Multiple Litigation to evaluate such contentions, inasmuch as the Judicial Conference of the United States created that Committee for precisely that purpose. The Coordinating Committee will have an opportunity to consider all of the arguments advanced by petitioners in this proceeding, as well as the arguments advanced by the other parties to the damage actions. Petitioners should not be permitted to circumvent the Coordinating Committee by conducting 'coordinated discovery' in this Court.**"

"** Petitioners attempt to support their contentions regarding 'multiplicity of discovery motions' by relying on Judge Robson's decision in *Commonwealth Edison Company* v. *Allis-Chalmers Mfg. Company*, 211 F. Supp. 729 (N.D. Ill. 1962). . . . That case, however, was one of the electrical equipment damage actions, in which all national discovery was coordinated by the Judicial Coordinating Committee—the very procedure which petitioners are now seeking to circumvent in this proceeding."

(Memorandum of Certain Publishing Companies in Opposition, dated Jan. 10, 1968, pp. 27-28)

The Department of Justice filed briefs with Chief Judge Campbell stating that it had no objection to the entry of such order as the Court deemed appropriate for the production of (i) documents procured through grand jury subpoenas, (ii) documents voluntarily submitted, and (iii) grand jury subpoenas, and that the Court had the discretionary powers to permit such inspection and copying.

During the pendency of the petition before Chief Judge Campbell, hearings were held in Kansas City on April 19, 1968, before a judicial panel of eight district judges, pursuant to notices served on all parties involved in the related children's books antitrust proceedings. On the basis of the determinations made at the Kansas City hearing, Judge Robson, acting on behalf of Chief Judge Campbell, entered an order on June 27, 1968, denying the petition without prejudice to its renewal. Judge Robson's ruling did not constitute a rejection of the relief sought in the petition. On the contrary, the order assumed that plaintiffs were entitled to inspect the documents subpoenaed by the grand jury. Judge Robson simply deferred to the contemplated discovery action of the judges at Kansas City. The order described the hearings in Kansas City at length, and then emphasized:

> "Among other discovery requests which were presented at the hearing on April 19, 1968, was the request for discovery of the documents submitted to the Grand Juries in this district in connection with investigations mentioned in the petition. With the approval of all the judges in attendance at the hearing, a ruling was made from the bench that the Grand Jury documents mentioned in the petition be produced by the defendants in the treble damage cases for inspection and copying. These discovery requests were granted after a finding of good cause and with an announcement that precautions would be taken in the order of production to protect documents which were privileged and immune from discovery. Orders are in the course of preparation for the implementation of these civil discovery rulings." (pp. 10-11).

The Coordinating Committee On Multiple Litigation

The district judges before whom related children's books antitrust cases had been instituted met informally in

December 1967 and January 1968 with representatives of the Coordinating Committee on Multiple Litigation to evolve coordinated discovery procedures for this multitude of actions. In February and March, 1968, the treble damage judges separately issued memoranda regarding proposals for a national discovery program and requesting suggestions of all concerned counsel.

On or about April 1, 1968, Judge Decker and the other treble damage judges notified all counsel that upon the recommendation of the Coordinating Committee a hearing would be held in Kansas City on April 19, 1968, to consider arguments on various national discovery issues, including:

> "The requests of the parties * * * for orders for production of documents."

The notification stated that "all judges before whom children's books anti-trust cases are pending have been invited to attend." Indeed, the judicial panel that met in Kansas City included Judges Harris (N.D. Cal.), Templar (D. Kan.), Clary (E.D. Pa.), Caffrey (D. Mass.), and Doyle (W.D. Wis.), before whom treble damage actions were pending. Judge Will represented the Northern District of Illinois.

At the April 19th argument, lead counsel for plaintiffs (Mr. Freeman), in reference to pending motions for production of documents, advised the judicial panel that a petition for production of documents had been completely briefed and awaited decision by Chief Judge Campbell. Mr. Freeman pointed out that the petition sought much broader production than could be granted by a single treble damage judge on a Rule 34 motion, since it included a request for the production of documents voluntarily submitted and documents subpoenaed from non-defendants.

Plaintiffs asked for a delay of the judicial panel's determination as to a production order until Chief Judge Campbell ruled (Tr. 11-15).

The panel, however, did not accept this suggestion. The issue of document production was pursued, and the publisher defendants argued at great length that, while Rule 34 motions were on file, an adequate showing of good cause had not been made:

> "[MR. MILLSTEIN] * * * Your Honor, there is one last point I would like to make, and that is on the question of the Grand Jury documents. We did not believe that the Rule 34 motion, which is being presently contended for, was within the scope of the court's order. Now it might be. We thought that the only discovery we were talking about was discovery with respect to the location of witnesses and the location of documents. They know where some documents are. They don't need that discovery.
>
> * * *
>
> "MR. MILLSTEIN: Well, Your Honor, we feel very strongly that there should be no wholesale access granted to the Grand Jury documents. We would appreciate the opportunity, of course, of arguing this at length at some date after Judge Campbell has ruled. The matter is now sub judicata before Judge Campbell. It was placed there by the plaintiffs themselves. It is most difficult for us to come before this court and argue it all over again when we know the matter is pending before Judge Campbell. But, if Your Honors want argument today on the question of the Rule 34 motion we are prepared to reach that point.
>
> "JUDGE BECKER: Well, we are giving consideration to motions for production of copies of the Grand Jury documents insofar as they are relevant to this

case and relate to the first wave of discovery and are either admissible in evidence or calculated to lead to the discovery of admissible evidence. * * *

"MR. MILLSTEIN: * * * Speaking for the parties to the proceeding we don't think a Rule 34 motion just directed to access of all Grand Jury documents fits the good cause requirement of Rule 34. And, we also believe that it violates the principle of Grand Jury secrecy. As far as good cause and Rule 34 is concerned, that is not simply a make-way piece of language in Rule 34. It has been held to be the required designation. And, to come before Your Honors and say, 'Give me access to all Grand Jury documents,' is hardly the type of good cause or designation which we think is called for by the cases. It is a fishing expedition, and under Rule 34 a fishing expedition, as distinguished from 26, is not permitted.

* * *

"MR. MILLSTEIN: What we are saying is this, when the plaintiffs come in and ask for all Grand Jury documents, they are supposedly in a position to state that these are material and relevant to the proceeding. How could they know that? They can't particularize. There is no way for them to know what is relevant to the proceeding. Your Honor, the correct way to get these documents is to serve the type of interrogatory which was served in plaintiffs' case in Philadelphia, namely one designed to locate witnesses and documents. And then serve a Rule 34 motion for the documents pointed out in the responses to those interrogatories. Your Honor—

"JUDGE BECKER: You see, the type of order we ordinarily enter in this is what I described to Mr. Freeman, and that is that if the documents are produced, provisions are made for motions for protective orders and for depositing with confidential designation, and these matters can be ruled upon at that time.

This is the first time in a multiple district proceeding that anyone has contended that the Grand Jury documents which resulted in an investigation that resulted in either a conviction or a consent decree were not relevant to the charges made in the Government's complaint.

"MR. MILLSTEIN: I am contending Your Honor, that they don't know whether they are relevant or not, and they don't know what the Grand Jury documents are—

"JUDGE BECKER: From what you say, they would never be able to find out.

* * *

"MR. MILLSTEIN: Well, I think the disclosure of Grand Jury documents for the purpose of impeaching witnesses and the like, I am not contending that, but what I am talking about is get Grand Jury documents pursuant to a Rule 34 motion. And, there, Your Honor, we respectfully submit that calling for it in that manner does violate Grand Jury secrecy, does not comport with the good cause requirements of Rule 34. And, that is our position on the Grand Jury documents. We think that documents should be obtained through the ordinary means. There are available means to achieve them. There are written interrogatories. * * *" (Tr. 47-52)

A full opportunity to be heard on the good cause issue was afforded. The judicial panel then recessed to consider the papers and arguments presented to it.

After the recess, Judge Becker announced the decisions reached by the Coordinating Committee and "the judges attending before whom cases are pending." (Tr. 78) With respect to the issue of doocument production, Judge Becker stated:

"Now, with respect to Grand Jury documents, it is the concensus of the judges here that discovery of Grand Jury documents at this time from parties should be recommended, that subject to the disposition and orders, which may be made by Chief Judge Campbell in Chicago, that the parties defendant will be required to produce for inspection and copying the Grand Jury documents in the Government's case which led to the Government's case in Chicago.

"We will recommend that on the basis of the information available in the files and records of these cases, and the information of the companion Government litigation, of which we may take judicial notice, that the judges consider making a finding of good cause, which is necessary under Rule 34, for the production of these documents.

"We will further recommend the protective orders, which were incorporated in the electrical equipment antitrust orders, both with respect to privilege and to confidential information.

* * *

"In addition to the Grand Jury documents for a time period from January 1st, 1959, to April 18, 1967, we will recommend that the defendants be required to produce the documents described in greater detail in the Rule 34 motion in Philadelphia, and perhaps in California, I am not sure, but I will refer to the Philadelphia motion, to include the price lists, including the catalogs, multipliers, adders and pricing rules and conditions, and term of sale, which existed during the period I have outlined, from January 1, 1959, to April 18, 1967, and that in addition the defendants be required to produce in the same manner as the Grand Jury documents, and the price information documents, the expense accounts of officers and employees with pricing authority, and their immediate assistants." (Tr. 80-82)

On May 14, 1968, the publisher defendants submitted a proposed order embodying the judicial panel's determinations, with the suggestion that the order be issued by each treble damage judge under a rule to show cause why the order should not be entered. With respect to document production the publisher defendants proposed:

"DOCUMENTS TO BE PRODUCED

On or before the day of 1968, each defendant shall produce for inspection and copying the following:

1. Those of its grand jury documents which led to the Government's case against such defendant filed on April 18, 1967 in the United States District Court for the Northern District of Illinois, good cause for ordering the production of such documents appearing from the files and records herein and from the information of the companion Government litigation.

2. A copy of each price list, price book, price catalogue or price sheet setting forth prices, discounts, adders, multipliers, pricing rules, formulae or policies, price adjustment clauses or terms and conditions of sale, including additions, insertions, supplements and changes therein, issued or maintained by such defendant for library editions of children's books during the period January 1, 1959 through April 18, 1967.

3. A copy of each expense account applicable to any period of time between January 1, 1959 and April 18, 1967 for the defendant's officer or employee having authority for pricing library editions of children's books and for his immediate assistant."

The publisher defendants submitted their proposed order with a ten-page letter of comments, which stated in pertinent part:

"12. *Production of Documents by Defendants Pursuant to Rule 34 (Plaintiffs' Part C-9)*

Defendants respectfully submit that their proposed order reflects the categories of documents which the Co-ordinating Committee suggested be produced in each District. Defendants' order is patterned after the Rule 34 motion filed in the Northern District of California covering the exact categories of documents enumerated by the Committee,—the grand jury documents which led to the Government's cases, as well as 'price lists, including the catalogs, multipliers, adders and pricing rules and conditions and terms of sale,' and certain expense accounts (Trans. p. 82)."

(Letter of May 14, 1968, to Coordinating Committee, p. 8)

The publisher defendants transmitted three lengthy letters of comments (May 14, May 22, and May 23).[3] At no point did they express doubt that Rule 34 motions were properly before the Coordinating Committee for consideration, voice dissatisfaction with the judicial proceedings in Kansas City, or contend that they had not had an adequate opportunity to be heard on the good cause issue. Their comments were confined to an attempt to limit the scope, but not the categories, of the documents to be produced.[4]

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[3] The wholesaler defendants submitted written comments as well.

[4] Of course, the defendants indicated that they did not waive the right to object to any order entered by the individual damage judges to whom the Coordinating Committee's recommendations were to be directed. As stated in their May 22nd comments: "Obviously any party is free to make whatever argument it wishes in any action to which it is a party. But plaintiffs' assertion that they 'understand defendants want the unfettered opportunity to again argue the very issues that were debated in Kansas City' is wholly without foundation."

The Coordinating Committee adopted the show cause form of order suggested by the defendants which it circulated to the various treble damage judges with its recommendations.

Proceedings Before Judge Decker

Judge Decker then distributed the recommended order, entitled proposed National Pretrial Order No. 1, to all parties involved in the treble damage actions in the Northern District of Illinois, with a request that they show cause why the order should not be entered. This order contained a proposed finding of "good cause" for the production of documents, including documents furnished by the defendants in response to grand jury subpoenas.

On July 11, 1968, Judge Decker conducted a pre-trial hearing, heard arguments and called for written suggestions of modifications to the proposed order. On July 16, 1968, Judge Decker entered the order in the cases pending before him, with several changes suggested by defendants.

The petitioners-defendants had ample opportunity at that time to contest the proposed finding of good cause and to attack the procedures which led to the order for document production.[5] Instead, the publisher and wholesaler defendants sought to have the entry of the order postponed until after the statutorily created Judicial Panel transferred the multiple cases to a single judge for coordinated discovery pursuant to Section 1407.[6] The

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[5] Defendant Random House stated that it had no objection to the entry of the order.

[6] Following enactment of Section 1407 on April 29, 1968, the Chief Justice of the United States Supreme Court appointed Judges Murrah, Wisdom, Robson, Becker, Lord, Weinfield, and Weigel to the Judicial Panel on Multidistrict Litigation.

reason for changed tactics was obvious, since by this time, National Pretrial Order No. 1 had already been entered by Judge Templar in Kansas, Judge Caffrey in Massachusetts, and Judge Harris in California.

On October 17, 1968, the Judicial Panel transferred all children's books cases to Judge Decker in the Northern District of Illinois. One of the reasons stated for selecting the transferee site was that:

> "the grand jury documents relating to the actions are in Chicago. Many of the plaintiffs * * * applied to the district court for release of documents subpoenaed in connection with the grand jury's investigation * * *."[1]

On December 6, 1968, Judge Decker, now acting as coordinating judge under the Section 1407 transfer, heard arguments by and received a brief from defendants-petitioners in support of a motion to stay the production of grand jury documents on the ground that the "facts" of good cause had not been demonstrated.

On December 13, 1968, Judge Decker re-affirmed his findings in National Pretrial Order No. 1 that good cause existed for the production of documents, stating:

> "Section 7(a) of National Pretrial Order No. 1 is hereby supplemented as follows:
>
> 'For good cause appearing, each plaintiff may, on or after December 16, 1968, inspect and copy the documents described in exhibit E which are now in the custody of the antitrust division of the Justice Department. These documents shall

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[1] *In re Multidistrict Treble Damage Litigation Involving Library Editions of Children's Books*, 1968 CCH Trade Reg. Rep. ¶ 72,665.

> be subject to the same restrictions which are outlined in section 7(b). Defendants may claim confidentiality and privilege by filing a list of such restricted documents with the clerk of the court * * *.
>
> "Finally, defendants' motion for a stay of section 7 of this court's July 16, 1968 order, as amended by the preceding paragraphs, is denied. The question of 'good cause' was fully considered by (1) the Coordinating Committee for Multidistrict Litigation, which held a hearing in Kansas City on April 19, 1968, and (2) this court, both prior to its July 16, 1968, ruling and again on December 6, 1968, when defendants' motion was briefed and reargued."

Thereupon, the petitioners sought a writ of mandamus in the Court of Appeals for the Seventh Circuit to compel Judge Decker "to vacate paragraph (7) and Exhibit E of his order dated July 16, 1968, known as National Pretrial Order No. 1, together with his supplementing order of December 13, 1968." The issues were extensively briefed by the respective parties. Upon full consideration, the Court of Appeals unanimously denied the petition.

ARGUMENT

The petitioners have asserted no basis whatsoever to invoke the extraordinary writ of mandamus. No amount of sophistry or invective can disguise the fact that the only issue presented to this Court is whether the District Court properly exercised its discretion to order the production of relevant documents. Mandamus is clearly an inappropriate avenue to attack such a ruling.

Moreover, the arguments advanced by petitioners fall beneath the weight of their factual misrepresentations. Throughout these extended and consolidated proceedings the defendants were given repeated opportunities to argue the issue of good cause—and availed themselves of these opportunities to contend vigorously, albeit unsuccessfully, that production of documents should not be ordered. This latest effort to frustrate and delay discovery is an imposition upon this Court that should be summarily rejected.

I. MANDAMUS WILL NOT LIE TO REVIEW A DISTRICT COURT'S FINDING OF GOOD CAUSE IN A DISCOVERY ORDER FOR THE PRODUCTION OF DOCUMENTS

It should be noted that petitioners have not proceeded with sufficient diligence in this action. The discovery order now attacked was initially entered by Judge Decker on July 16, 1968, in his capacity as an individual treble damage judge. Under these circumstances, there is authority for dismissal of the petition for writ of mandamus as not timely filed, since the designated period to appeal or

challenge that ruling has long since expired. *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960).[8]

The sole issue presented by this case, if timely, is whether the District Court so clearly abused its broad discretion as to pretrial discovery that a writ of mandamus should issue to vacate its order for production of documents. Before the Court of Appeals, petitioners asserted no basis whatsoever to invoke the extraordinary writ of mandamus. Their petition for certiorari quite surprisingly, but significantly, fails to discuss this issue.

It has been consistently held that mandamus will not lie to review a trial court's discovery order unless the aggrieved party shows a clear abuse of discretion and establishes an indisputable right to such drastic relief. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *Texas Gulf Sulfur Co.* v. *Ritter*, 371 F.2d 145, 146-147 (10th Cir. 1967). This doctrine was most recently expressed in *Will* v. *United States*, 389 U.S. 90 (1967), wherein this Court unanimously reversed the issuance of a writ of mandamus directed against a trial court's discovery order. The opinion stressed that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy," and cautioned that:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of non-

[8] The petitioners' claim that this case raises problems as to administration of litigation under Section 1407 simply ignores the fact that Judge Decker ordered the production of documents in the individual treble damage actions pending before him—prior to any transfer and consolidation under Section 1407.

> appealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" At 95, 98, n. 6.

The power to grant the peremptory writ of mandamus is discretionary with the Court of Appeals, *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 25-26 (1943), and such authority has been used sparingly, especially with respect to rulings upon discovery issues entrusted to the discretion of the trial judge. Thus, courts of appeals have consistently denied petitions for writ of mandamus to review a finding of good cause for the production of documents. *E.g., United States* v. *Hughes,* 388 F.2d 236, 239 (5th Cir. 1968); *Paramount Film Distributing Corp.* v. *Civic Center Theatre,* 333 F.2d 358 (10th Cir. 1964); *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.,* 380 F.2d 277, 284 (2d Cir. 1967); *In re Illinois Central R.R.,* 192 F.2d 465 (5th Cir. 1951) (writ of prohibition); *Keaton* v. *Kennamer,* 42 F.2d 814 (10th Cir. 1930).[9]

The petitioners have not questioned the judicial power to enter the discovery order, nor charged usurpation of that power. They claim rather that insufficient factual basis existed to support the discovery order, and anchor their expletory contentions upon the premise that manda-

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[9] The petitioners misplace reliance on *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964). That case involved the appropriateness of a Rule 35 order of "first impression" upon "a substantial allegation of usurpation of power." Moreover, that decision expressly reaffirmed the rule: "that in the ordinary situation where the sole issue presented is the district court's determination that 'good cause' has been shown for an examination, mandamus is not an appropriate remedy, absent, of course, a clear abuse of discretion." At 111.

mus must necessarily issue because the District Court allegedly weighed one factor more heavily than another to determine that good cause had been shown. This "argument is transparently inaccurate." *Pennsylvania R.R.* v. *Kirkpatrick,* 203 F.2d 149, 150 (3d Cir. 1953); See *Parr* v. *United States,* 351 U.S. 531, 520 (1956). The finding of good cause and consequent order to produce documents are matters of judgment and discretion. The exercise of this discretion cannot be reviewed piecemeal through mandamus proceedings. *Bank Line, Ltd.* v. *United States,* 163 F.2d 133 (2d Cir. 1947).

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO ORDER THE LIMITED PRODUCTION OF DOCUMENTS BY DEFENDANTS INCLUDING THOSE SUBPOENAED IN THE COURSE OF A NARROWLY DEFINED INVESTIGATION BY THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE

Petitioners object to National Pretrial Order No. 1 insofar as it requires document production. This is nothing more than an attack upon the exercise of discretion by the trial judge and cannot be the basis of a petition for a writ of mandamus. However, in view of the petition's incomplete and distorted recitation of the proceedings below, this brief will discuss the total lack of substance in each contention made by petitioners.

A. Motions to Produce Documents Were Properly Before the Court and Defendants Had Abundant Opportunity to be Heard

The petitioners base their request for extraordinary relief upon the disingenuous contention that an adequate opportunity to be heard on the good cause issue was not afforded them and that there was insufficient factual basis

for the trial court to order production of documents subpoenaed by the grand jury.

In several related children's books cases, Rule 34 motions were filed supported by affidavits showing good cause for the production of the categories of documents now at issue. In addition, a petition for production of documents procured through grand jury subpoenas, among others, was filed by the treble damage claimants in *In re Grand Jury Proceedings,* 66 G.J. 3003 (N.D. Ill.), which contained specific allegations of fact supporting a good cause showing. Rulings on those motions were deferred in the face of a developing program by the Coordinating Committee on Multiple Litigation for simplified and unified discovery procedures.

The Coordinating Committee on Multiple Litigation, with most of the judges before whom treble damage actions were pending, heard arguments of all parties with respect to several discovery issues upon which a national coordinated program was sought. The pending motions to produce documents in the children's books cases were embodied in the notice of this hearing and were fully considered by the assembled judicial panel. Indeed, counsel for the publisher defendants argued at great length about the adequacy of "the Rule 34 motion, which is being presently contended for."

The Coordinating Committee thereafter found "good cause" and recommended to the individual judges that good cause findings be made in the treble damage proceedings as part of an order requiring the production of the involved documents for inspection. In this regard, petitioners submitted a draft order which in effect conceded that a motion to produce documents had been adequately presented, argued and considered, and that the

Coordinating Committee had at least preliminarily found good cause. Petitioners suggested to the Coordinating Committee a form of order that the various treble damage judges could issue on a rule to show cause why a Rule 34 production order should not be entered.

This was the procedure followed by Judge Decker during July 1968, when acting as an individual damage judge. He proposed National Pretrial Order No. 1 and asked for comments, suggestions, and arguments of counsel. Thus, petitioners again had a full opportunity to contest and be heard on every aspect of the proposed order, including the finding of good cause for the production of documents described in Exhibit E. Judge Decker considered the oral and written arguments submitted by the parties, and entered National Pretrial Order No. 1 on July 16th, with some of the amendments suggested by the defendants, requiring the production of documents for inspection by December 15, 1968.[10]

On December 6, 1968, after Judge Decker had been designated to coordinate all the related children's books antitrust cases, petitioners once again presented oral and written arguments in opposition to the document production portion of the order. Upon consideration of these renewed objections, Judge Decker on December 13, 1968, reaffirmed his finding of good cause and his direction to produce documents for inspection.

These procedures fully complied with the essential requirements of the Federal Rules of Civil Procedure. It is not essential that a motion be formally designated a "Rule 34 Motion" where all parties understand that document

[10] The failure of petitioners to make timely attack upon entry of this order underscores the utter lack of merit in their present posture.

production is requested. In fact, such a motion may be presented orally in the course of a hearing or at trial. *Jones* v. *Uris Sales Corp.*, 373 F.2d 644, 647 (2d Cir. 1967).

In the present case, more than adequate notification of plaintiffs' motion to produce documents was provided by the Rule 34 motions in several of the related cases, by the petition to produce documents for inspection, filed by the treble damage claimants before Chief Judge Campbell, by the notice of the Coordinating Committee hearing of April 19, 1968, and by Judge Decker's rule to show cause why National Pretrial Order No. 1 should not be entered.

The petitioners used the many opportunities to present their position. They filed extensive briefs in opposition to the petition to produce documents before Chief Judge Campbell; made arguments before the Coordinating Committee, supported by extensive written comments; submitted suggestions in response to the show cause order issued by Judge Decker prior to entry of National Pretrial Order No. 1 on July 16, 1968; and reargued the issue before Judge Decker on December 6, 1968, upon submission of yet another brief.

B. The "Factual Basis" for a Finding of Good Cause

Without any proffer of the arguments they wish to present to Judge Decker to contravene the showing of good cause already made, petitioners belatedly demand an evidentiary hearing at which the treble damage plaintiffs would be required to prove special circumstances making necessary the production of the documents subpoenaed by the grand jury, as well as other documents enumerated in Exhibit E of National Pretrial Order No. 1. This position, to say the least, is archaic and incompatible with the well accepted and repeatedly utilized liberal discovery procedures.

No evidentiary hearing on the question of good cause is required by the federal rules. A trial judge has broad discretion as to how a showing of good cause may be made. As stressed in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 119 (1964), "good cause" in terms of Rule 35:

> "* * * does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.
>
> "Of course, there are situations where the pleadings alone are sufficient to meet these requirements."

In these proceedings, good cause was abundantly demonstrated by the pleadings, affidavits, arguments, and briefs before the treble damage judges, Chief Judge Campbell, and the judicial panel. The factors enumerated by plaintiffs in the record before the District Court fully support the order for production of documents. *Connecticut Mutual Life Insurance Co.* v. *Shields*, 17 F.R.D. 277 (S.D. N.Y. 1955).

Consent decrees had been entered in federal civil proceedings charging price-fixing conspiracies involving library editions of children's books. The allegations in the treble damage actions were similar to the civil complaints, with the addition of certain wholesalers of the

price-fixed books as defendants.[11] The documents subpoenaed from the defendants in the course of an investigation confined to the illegal behavior charged in both the civil complaints and treble damage actions are certainly relevant to proof of the alleged conspiracy or reasonably calculated to lead to the discovery of such evidence. See *Bank Line, Ltd.* v. *United States*, *supra* at 136.

A multitude of treble damage actions are pending in various judicial districts. "The very magnitude alone of this related litigation * * * cries out for all possible simplification and unification of procedures." *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F. Supp. 729, 734 (N.D. Ill. 1962). A solemn duty is imposed upon the judge in complex multidistrict litigation to institute and enforce efficient procedures. Thus, the *Manual for Complex and Multidistrict Litigation* issued by the Coordinating Committee on Multiple Litigation provides:

> "The trial court has the undoubted power and inescapable duty to control the processing of a case

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[11] Contrary to the insinuation of petitioners, the fact that the grand jury proceeding did not result in indictments is no impediment to the subsequent utilization of grand jury documents in furtherance of the civil actions—since the grand jury proceedings were not tainted by misuse, abuse and bad faith. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683-684 (1958).

The petitioners further seek to create the misimpression that National Pretrial Order No. 1 requires production of documents which may be irrelevant by lifting the remarks of plaintiffs' liaison counsel out of context. (Petition, p. 23) As stressed in argument by plaintiffs to the Judicial Panel in Kansas City, the petition before Chief Judge Campbell sought far broader production than what the Coordinating Committee recommended and Judge Decker ordered, in that plaintiffs requested documents voluntarily submitted and documents secured from non-defendants.

from the time it is filed. In the complex case the court must assume an active role in managing all steps of the proceedings." (p. 15).

It does not require lengthy argument to show the urgent need for efficient, simplified procedure in cases of the magnitude of the proceedings before Judge Decker. The order now attacked was originally entered by Judge Decker in the individual treble damage actions pending before him; then reaffirmed and implemented after the related antitrust litigation had been transferred to him for coordination of pretrial discovery. While in the ordinary two or three party litigation it is possible to require a party to conduct depositions or other discovery proceedings in order to establish a foundation for its Rule 34 motion, such a procedure applied to complex litigation, as here, would result in chaos. If interrogatories or depositions were required first steps, resolution of this case would be delayed for many years.[12]

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[12] Nothing in any of the cases cited by petitioners regarding the elements necessary to show "good cause" militates against the entry of the document production order here attacked. All were relatively simple and straightforward situations where the party seeking production had the resources to obtain the information sought by readily alternative means. In *Hauger* v. *Chicago R.I. & P.R.R.*, 216 F.2d 501, 508 (7th Cir. 1954), a personal injury plaintiff asked for production of witness' statements taken by defendant's attorneys. Finding that all the witnesses were alive and had been made available to plaintiff for depositions, the court held that "the rights of a litigant in the work-product of his lawyers and agents are not required to give way to an adversary's right of discovery." The same result was reached in *Guilford National Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (good cause showing requirement specifically limited to written statements of witnesses).

Moreover, there is no justification for imposing this type of burden on the judicial apparatus. As stressed below by the treble damage plaintiffs, documents which are relevant, material, and essential to the establishment of the alleged price-fixing conspiracy have been assembled as a result of federal investigation into the same matter, and impounded in the custody of the Antitrust Division. Since these documents have been collected in a central location, their release for inspection poses no burden or expense to petitioners.[13] Thus, petitioners will be far less inconvenienced by a production order than by being required to submit vast numbers of their employees to depositions. They can only hope to frustrate, delay, and exhaust plaintiffs. No court can countenance such tactics. In addition, no prejudice will result to defendants because of the inclusive protective order entered by Judge Decker in connection with his production order. Finally, by providing plaintiffs with these documents at an early stage of the litigation, the deposition program can be more realistically shaped and the possibilities of terminating this litigation short of twenty or thirty trials will be immeasurably enhanced. The fact that similar production orders have been entered in the early stages of almost all consolidated or coordinated proceedings to date attests to the efficacy and justice of this mode of procedure.[14]

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[13] Of course, this eliminates one of the primary reasons for the technical requirements of Rule 34.

[14] It has become standard procedure for district courts, in treble damage cases brought by public agencies claiming overcharges on price-fixing commodities, to permit access to documents previously subpoenaed by a grand jury at the earliest stages of discovery. This occurred in the following antitrust suits: *Illinois* v. *Pennsalt Chemical,* No. 46550 and related cases (N.D. Cal., Boldt, J., March 17, 1967) (*Chlor-alkali*); *Illinois Public Service Co.* v. *Aluminum Co. of America,* No. 65 C 1643 (N.D. Ill.,

The pending treble damage actions were brought on behalf of school districts and tax supported libraries victimized by the alleged price fixing conspiracies. The plaintiffs are "charged with the duty to protect wide-reaching public interests." *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 489 (E.D. Pa. 1962). These circumstances intensify the strong public policy to support enforcement of the antitrust laws by treble damage claimants. Such policy, though derided by petitioners, has relevance to a judicial determination whether to order production of documents.[15]

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[14] (Continued)
Robson, J., Dec. 12, 1965) (*Aluminum Cable*); *Chicago Transit Authority* v. *United States Steel Corp.*, No. 66 C 1487 (N.D. Ill., Perry, J., August and Sept. 1967) (*Steel Wheels*); *Illinois* v. *Brunswick Corp.*, No. 62 C 451 (N.D. Ill., Tehan, J., Nov. 1, 1962) (*Folding Gymnasium Bleachers*); *Illinois* v. *Sperry Rand Corp.*, No. 65 C 1549 and related cases (N.D. Ill., Will, J., Feb. 25, 1965) (*Library Shelving*); *Eastland Construction Co.* v. *American Radiator & Standard Sanitary Corp.*, No. 46162 and related cases (N.D. Cal., July 30, 1968) (*Plumbing*) (order entered after argument before Judge Harris on June 26, 1968, as to propriety of discovery motion).

[15] As Professor Moore points out with respect to the requirement of a good cause showing for document production:

> "In short, any showing that failure to order production would unduly prejudice the preparation of the party's case, or cause him hardship or injustice, will support the order. * * *
>
> "In case of business records, this two-factor test, relevancy plus need, often resolves itself into a question of simply relevancy, for the exclusive possession of the information through which the claim or defense must be established is so plain as to make the requirement of a showing little more than a requirement of a recitation. * * * [I]n this sort of case the usual

In short, these factors overwhelmingly established good cause. These matters were fully considered by the trial court, petitioners were apprised of the reasons advanced for the production of documents, and took several of the opportunities afforded them to argue these issues, both orally and with extensive briefs. Even at this late stage in the proceedings, petitioners have not indicated anything else they can say which would defeat the showing of good cause.[16]

C. The Document Production Raises No Issue of Grand Jury Secrecy

Upon request of the plaintiffs in consolidated treble damage actions, and "for good cause appearing," the District Court authorized the inspection and copying of documents in the custody of the Antitrust Division which are material, relevant, and essential to prove the alleged price fixing conspiracy. Such inspection is unrelated to whether these documents were presented to any grand jury

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[15] (Continued)

alternative to production of particular documents is the task of answering searching interrogatories; the information, then, must be made available in any event, and the question is one of who will pay for assembling and collating it." 4 *Moore's Federal Practice* (2d ed. 1968), ¶ 34.08, pp. 2476-2482.

[16] Petitioners contend that Exhibit E (Appendix B to the Petition) constitutes "wholesale" production of documents, and that such an order must be preceded by interrogatories and depositions seeking identification of the documents which then may be more specifically identified in another motion to produce. The treble damage plaintiffs submit that the specification in the original motions, and consequent order, was adequate under any circumstance. 4 *Moore's Federal Practice,* (2d ed. 1968), ¶ 34.07.

or used by the Government for any other purpose. The plaintiffs have sought and been given access to the subpoenaed documents for their intrinsic value in the treble damage actions, rather than to learn what occurred before the grand jury. It has been uniformly held that production of such documents for their own sake does not intrude upon the secrecy of grand jury proceedings.[17]

These guiding principles are authoritatively expressed in *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). In affirming an order which permitted the Interstate Commerce Commission to inspect records subpoenaed by a federal grand jury, the Court of Appeals stated:

> "[T]he Rule [6(e) of the Federal Rules of Civil Procedure] is intended only to protect against disclosure of what is said or what takes place in the grand jury room. Documents as well as oral testimony of course may come within its proscription against disclosure. * * * However, it is not the purpose of the Rule to foreclose from all future revelation to

[17] The cases relied upon by petitioners may be readily distinguished since they involve disclosure of testimony given before grand juries. The disclosure of verbatim accounts of grand jury proceedings raises issues far beyond the confines of the present case. Moreover, *Application of State of California*, 195 F. Supp. 37, 39 (E.D. Pa. 1961), is not remotely relevant because the applicants there sought grand jury materials "*before* institution of suits," *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co., supra* at 736, and before it was certain that the grand jury investigation had concluded. In *United States* v. *Becton, Dickinson & Co.*, 30 F.R.D. 132 (D. N.J. 1962), defendants in a government civil action sought production of all grand jury documents without designating the scope of the grand jury investigation. Here the government has no objection to inspection of the documents.

proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. * * *

"In the present case the inspection sought by the ICC will in no way impinge upon the secrecy of the grand jury's deliberations. The representatives of the ICC do not seek to learn what use the grand jury has made of appellant's records. They wish only to inspect and copy the records, which happen to be in the control of the grand jury, for their own lawfully authorized investigation. No question of the 'disclosure of matters occurring before the grand jury' is therefore involved and Rule 6(e) does not prohibit the examination."

This holding has been consistently applied. In *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 211 F. Supp. 729, 734 (N.D. Ill. 1962), Judge Robson ordered the production of documents produced before a federal grand jury, copies of subpoenas and lists of documents furnished the Government, and stated:

"When the document sought is sought for itself independently rather than because it was displayed to the grand jury, there is no bar of secrecy."

The same view was expressed in *In re Hearings before the Committee on Banking and Currency of the United States Senate,* 19 F.R.D. 410, 412-13 (N.D. Ill. 1956), and *In the Matter of Grand Jury Proceedings* (General Dynamics Corp.), 1961 Trade Cases, ¶70,027 (S.D.N.Y. 1961). These decisions leave no doubt as to the trial court's

discretionary power to order production of documents previously subpoenaed by a grand jury.[18]

There is simply no basis for defendants to insist upon a showing of "compelling necessity" or "particularized need." These standards relate only to the disclosure of grand jury testimony or proceedings, something that has not been requested.[19]

The documents sought from petitioners are simply and plainly the documents prepared or received by them in the ordinary course of business. The only connection between these documents and a grand jury is that copies of them were produced in response to a subpoena issued by a grand jury. These documents gained no immunity from further production by having once been produced in response to a grand jury subpoena.

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[18] The petitioners misplace reliance upon *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956), *grant of certiorari vacated and rev'd on other grounds, United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 (1957). That holding rests entirely upon the abuse and perversion of the normal functions of the grand jury, and has been so limited by numerous subsequent decisions. *E.g., United States* v. *Morton Salt Co.*, 216 F. Supp. 250, 254 (D. Minn. 1962); *United States* v. *General Electric Co.*, 209 F. Supp. 197, 200-201 (E.D. Pa. 1962).

[19] Even were these standards pertinent, there is ample authority for the disclosure of grand jury testimony to further discovery in complex antitrust litigation. *E.g., Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir.), *stay denied*, 83 S.Ct. 964 (1963); *Nairn* v. *Cleary*, 312 F.2d 748 (3d Cir. 1963). See *Dennis* v. *United States*, 384 U.S. 855, 868-870 (1966).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

LEE A. FREEMAN,
Attorney for Respondents Honorable Bernard M. Decker and certain of the treble damage plaintiffs

Of Counsel:
LEE A. FREEMAN, JR.
JERROLD E. SALZMAN
FREEMAN & HANLEY
One North LaSalle
Chicago, Illinois

March, 1969

WILLIAM J. SCOTT
Attorney General
State of Illinois

CRAWFORD C. MARTIN
Attorney General
Thomas W. Mack
Assistant Attorney General
State of Texas

THEODORE L. SENDAK
Attorney General
Richard C. Johnson
Chief Counsel
State of Indiana

RAYMOND F. SIMON
Corporation Counsel
City of Chicago

J. LEE RANKIN
Corporation Counsel
City of New York

HAROLD E. KOHN
David Berger
Special Counsel
City of Philadelphia, et al.

JOHN A. MURRAY
Attorney for
City of St. Paul, et al.

DAVID J. YOUNG
Attorney for Archbishop
and Bishops of the Six
Dioceses in Ohio

PAUL W. BROWN
Attorney General
Donald Weckstein
Assistant Attorney General
State of Ohio

CHAUNCEY H. BROWNING, JR.
Attorney General
Benjamin F. Yancey, Jr.
Assistant Attorney General
State of West Virginia

MAXWELL M. BLECHER
Special Counsel
States of Hawaii,
Washington, Oregon, et al.

JOHN B. BRECKENRIDGE
Attorney General
Charles N. Henson
Assistant Attorney General
State of Kansas

ROBERT W. WARREN
Attorney General
George F. Sieker
Assistant Attorney General
State of Wisconsin

DOUGLAS M. HEAD
Attorney General
Roger E. Montgomery
Assistant Attorney General
State of Minnesota

LOUIS J. LEFKOWITZ
Attorney General
State of New York

SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

No. 1034

In the

Supreme Court of the United States

OCTOBER TERM, 1968

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

—v.—

HON. BERNARD M. DECKER,
United States District Judge, *et al.*

REPLY BRIEF OF PETITIONERS

HORACE S. MANGES
IRA M. MILLSTEIN
DONALD J. WILLIAMSON
A. PAUL VICTOR
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022

W. DONALD McSWEENEY
WILLIAM A. MONTGOMERY
SCHIFF HARDIN WAITE
DORSCHEL & BRITTON
231 South La Salle Street
Chicago, Illinois 60604

H. TEMPLETON BROWN
LEE N. ABRAMS
MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT
231 South La Salle Street
Chicago, Illinois 60604

SAMUEL WEISBARD
DAVID L. PORTER
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

(List of counsel for petitioners continued on inside cover)

HAEL A. JENKINSON
JOHN W. STAGE
WINSTON, STRAWN, SMITH &
PATTERSON
1400 First National Bank Building
Chicago, Illinois 60603

CONRAD W. GOELDNER
CHAPIN, HALL & STEWART
[illegible]

ROBERT W. BERGSTROM
STEPHEN M. SLAVIN
BERGSTROM & GIBSON
[illegible]

DAVID P. LIST
KENNETH A. MANASTER
LEIFMAN, WILLIAMS, BENNETT,
BAIRD & MELLOW
[illegible]

KARL E. POLLOCK
ALAN H. SILVERMAN
[illegible]

FRED HARRIS
[illegible]

LEO ROSEN
[illegible]

BELLA L. LINDEN
DAVID BLASBAND
LINDEN & DEUTSCH
[illegible]

JOHN J. MCDEVITT
CHADWELL, KEOX, KAYSER,
RUGGLES & MCLAREN
[illegible]

BRUCE A. BECKER
LEON P. GOLD
SHEA & GARDY (FORMERLY SHEA &
GOULD)
[illegible]

BRUCE E. BARTON
KEVIN L. CARROLL
WHITE & CASE
[illegible]

JOHN G. CHRISTIE, JR.
BELL, BOYD, LLOYD, HADDAD
& BURNS
[illegible]

WILLIAM J. STOCKHAUSEN
BATTELLE, WARFIELD &
STEPHENS
[illegible]

Attorneys for Petitioners

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REPLY BRIEF OF PETITIONERS

Preliminary Statement

Because the treble-damage plaintiffs apparently recognize that respondent's document production order constitutes a "clear abuse of discretion" and a "usurpation of judicial power," they have chosen to disregard, and/or to distort, the relevant facts and applicable law discussed in the petition.[1] Accordingly, petitioners are constrained to file this reply brief, in order to point out some of the misrepresentations, inaccuracies, and incomplete statements relied upon by the treble-damage plaintiffs in their efforts to defend respondent's conduct.

[1] The petition for certiorari will be referred to hereinafter as "Pet.," and the treble-damage plaintiffs' brief in opposition to the petition will be referred to as "Pl. Br."

Most significantly, the brief in opposition virtually ignores the express requirements of Rule 34 and this Court's interpretations thereof, petitioners' due process rights, and traditional principles of grand jury secrecy, solely because of "the urgent need for efficient, simplified procedure in cases of the magnitude of the proceedings before Judge Decker" (Pl. Br., p. 27). This, of course, is the same position that the treble-damage plaintiffs have taken throughout the tortuous course of this litigation—that, solely because of considerations of convenience and expediency, they should be relieved of the "onerous and expensive burden" of complying with the Federal Rules of Civil Procedure, and should be granted unrestricted access to grand jury documents without even making an effort to establish "good cause" or "particularized need" (see Pet., pp. 6-8, 11-12, 15-19, 24-27). Indeed, the treble-damage plaintiffs have unhesitatingly, and unashamedly, admitted that their attempts "to secure from the Government the results of its investigation" have actually been motivated by their desire to "be able to *sort out* from the large volume of documents involved those that are relevant to discovery in their treble damage suits," in order to facilitate their prosecution of those private actions (Pet., pp. 6, 12) (emphasis supplied).

But the treble-damage plaintiffs have never even attempted to demonstrate the relevancy or materiality of the grand jury documents which they are seeking. Instead, they have relied merely on the unsupported assertion (made in a *separate* proceeding) that *all* of those documents are relevant and material (see *infra*, p. 8). In this respect, their position clearly is inconsistent both with this Court's recognition that the "good cause" requirement of Rule 34 "is not a mere formality, but is a plainly expressed

limitation of the use of the Rule" (*Schlagenhauf* v. *Holder*, 379 U.S. 104, 117-118 (1964)), and also with this Court's holding that the "indispensable secrecy of grand jury proceedings . . . must not be broken except where there is a compelling necessity"—i.e., something more than the mere "relevance" and "usefulness" of the information sought (*United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-683 (1958)) (see Pet., pp. 28-31). Although the treble-damage plaintiffs have artfully attempted to convey the erroneous impression that the relevancy and materiality of the documents sought has been established (Pl. Br., pp. 22, 28), their mere unsupported assertion to that effect manifestly does not satisfy the requirements enunciated in Rule 34 and in this Court's opinions.[2] Surely if neither a state nor Congress can authorize government officials to inspect documents without compliance with the Fourth Amendment, a district court cannot properly grant private litigants unrestricted access to private documents of other parties unless equally stringent standards are met (see *Katzman* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967)).

Moreover, the treble-damage plaintiffs now complain, incorrectly, that petitioners have requested "an evidentiary hearing on the question of good cause," and that requiring them to utilize interrogatories or "to conduct depositions or other discovery proceedings in order to establish a foundation for [a] Rule 34 motion . . . would result in chaos,

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[2] "Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party '*showing* good cause,' not upon a mere allegation or recitation that good cause exists." *Martin* v. *Capital Transit Co.*, 170 F. 2d 811, 812 (D. C. Cir. 1948) (emphasis in original).

[and] resolution of this case would be delayed for many years" (Pl. Br., pp. 24-25, 27). In fact, however, petitioners have *not* requested an evidentiary hearing regarding "good cause," but merely have insisted that the treble-damage plaintiffs be required to comply with the "good cause" requirement of Rule 34, particularly because disclosure of grand jury documents is involved. Moreover, the treble-damage plaintiffs have neglected to mention that they have *already* received defendants' voluminous answers to interrogatories which expressly were intended to disclose the "existence, location and custodian" of relevant documents (see Pet., pp. 8-11). Why, then, would there be "chaos" or "prolonged delay" if plaintiffs were required to "establish a foundation for their Rule 34 motion," which seeks unrestricted access to the results of the grand jury investigations?

Also significant are the treble-damage plaintiffs' repeated, and deliberately misleading, assertions that they are seeking the grand jury documents "for their intrinsic value in the treble damage actions," and that "the only connection between these documents and a grand jury is that copies of them were produced in response to a subpoena issued by a grand jury" (Pl. Br., pp. 31, 33). In fact, however, the treble-damage plaintiffs' interest in the grand jury documents *is based entirely upon the grand juries' interest in those documents,* as can readily be seen from their inability to describe with any meaningful specificity the subject matter of the documents which they seek (see Pet., pp. 31-34). But the grand jury investigations related to the entire publishing industry, rather than merely to sales of library editions of children's books (see *infra,* pp. 6-8); it is therefore obvious that many (if not most) of the grand jury documents have no bearing on the treble-

damage actions, and that the treble-damage plaintiffs could not possibly establish "good cause" for the wholesale disclosure of those documents. That, of course, is the real basis of their desperate efforts to avoid application of Rule 34 to this litigation; if they were required to comply with that Rule, they would not "be able to sort out" relevant documents from the mass of material which was obtained by the grand juries through the exercise of their sweeping investigatory powers. But, as the Court of Appeals for the Tenth Circuit recently said (albeit in a different context):

> "The expeditious and efficient processing of litigation is laudable and should be encouraged. But the Federal Rules provide an adequate and orderly procedure . . . . Only by adherence to the spirit of these rules can we be sure of a full hearing—the essence of due process." *Sooner State Dairies, Inc.* v. *Townley's Dairy Co., et al.*, 1969 CCH Trade Cas. ¶72,711 (10th Cir. 1969).

Accordingly, the treble-damage plaintiffs should be compelled to submit a *meaningful and specific* Rule 34 motion, and document production should be ordered only insofar as they can establish "good cause" therefor.

Also underlying the treble-damage plaintiffs' castigation of the petition for certiorari is their contention that petitioners have already had a full and meaningful hearing with respect to the questions of "good cause" and "particularized need." The unsoundness of that contention, however, is convincingly demonstrated by the treble-damage plaintiffs' reliance upon inaccuracies and misrepresentations to support it. In order that this Court may consider the petition in a proper perspective, the balance of this reply brief will discuss the principal misleading factual and legal assertions advanced by the treble-damage plain-

tiffs with respect to the purported adequacy of the hearing afforded to petitioners, and with respect to the propriety of respondent's document production order.

The Treble-Damage Plaintiffs Have Asserted, Incorrectly, That Their Private Actions Are Virtually Identical in Scope to the Grand Jury Investigations and the Government Civil Actions

1. Initially, the treble-damage plaintiffs describe the grand jury investigations as "a narrowly defined investigation by the Antitrust Division," and assert that the only grand jury documents encompassed by respondent's document production order had been subpoenaed "in the course of an investigation *confined to the illegal behavior* charged in both the civil complaints and treble damage actions" (Pl. Br., pp. 21, 26) (emphasis supplied). But, as the treble-damage plaintiffs have neglected to mention, respondent's document production order expressly states that the grand jury investigations related to the *entire* "publishing industry" (Pet., App. B, p. 6a), whereas the private damage actions (as well as the Government civil actions) relate to *only one facet* of that industry—the sale of library editions of children's books.

2. The treble-damage plaintiffs also attempt to convey the erroneous impression that the Government civil actions involved a nationwide horizontal price fixing conspiracy (Pl. Br., pp. 3, 25-26). But, as the Department of Justice itself has stated, each of the 18 actions which it filed "named a [single] book publisher as a defendant and charged a [vertical] price-fixing conspiracy between the publisher and, in effect, its wholesalers in the sale of library editions of children's books" (Department of Jus-

tice brief, dated January 10, 1968, in *In Re Grand Jury Proceedings,* No. 66 GJ 3003 (N. D. Ill.), p. 1).

3. The treble-damage plaintiffs repeatedly assert that their private damage actions are "similar to" or "are based in large part on" the Government civil actions (Pl. Br., pp. 3, 25-26). But those Government actions were much more limited in scope than the treble-damage actions, and *most* of the defendants in the damage actions (including many publishers, despite the treble-damage plaintiffs' assertion to the contrary (Pl. Br., pp. 25-26)) were *not* defendants in the Government actions.[3]

4. In any event, even if the treble-damage complaints were identical to the complaints in the Government actions, all of the documents which were subpoenaed during the grand jury investigations would not *ipso facto* be relevant or material to the damage actions (or even to the Government actions). On the contrary, because respondent's document production order broadly encompasses *all* of the documents which were subpoenaed from the damage-action defendants during grand jury investigations *of the publishing industry,* it is manifest that many of those documents are wholly unrelated to the subject matter of the treble-damage actions (sales of library editions of children's books). This was plainly recognized by plaintiffs' liaison counsel, when he revealed that the treble-

[3] As noted in the petition for certiorari (pp. 5-6), the complaints in the treble-damage actions allege three different types of conspiracies: horizontal conspiracies among publishers; horizontal conspiracies among wholesalers; and vertical conspiracies among publishers and wholesalers. Each of the Government actions, on the other hand, alleged only vertical conspiracies between the single named publisher-defendant and *its* wholesalers.

damage plaintiffs were seeking access to all of the grand jury documents so that they would then "be able to sort out from the large volume of documents involved those that are relevant to discovery in their treble damage suits" (see *supra,* p. 2).

The Treble-Damage Plaintiffs Artfully Strive to Convey Several Erroneous Impressions With Respect to Their Petition to Chief Judge Campbell

1. Despite the treble-damage plaintiffs' insinuations to the contrary (Pl. Br., pp. 5-6, 24), their petition to Chief Judge Campbell was *not* a Rule 34 motion, and it was *not* presented in a civil action. Moreover, the parties' briefs with respect to that petition did *not* discuss either Rule 34 or the principles which govern its application. On the contrary, the treble-damage plaintiffs' brief asserted simply that considerations of convenience and expediency warranted the requested document disclosure; they made no effort to *demonstrate* the relevancy or materiality of the documents sought, relying instead on a mere unsupported assertion regarding relevancy and materiality (see *supra,* p. 2). The publisher-defendants responded that the requisite "particularized need" had not been established, and that grand jury secrecy could not properly be violated merely to relieve private litigants of "the onerous and expensive burden" of conducting appropriate discovery in their civil actions (Pet., pp. 7-8, n. 6).

2. The treble-damage plaintiffs state unequivocally that the Justice Department "had no objection" to their petition for disclosure of the grand jury documents (Pl. Br., pp. 6, 31, n. 17). Those statements, however, deliberately

misrepresent the Justice Department's position, as can readily be seen from the "Reply" which the Justice Department submitted to Chief Judge Campbell:

> "The United States objects to the production of documents obtained by grand jury subpoenas unless and until the court enters an order granting such disclosure as it deems proper after the owners of said documents are given notice and an opportunity to be heard." Justice Department Reply to Petition, dated November 20, 1967, p. 2.

3. Moreover, the parties' briefs to Chief Judge Campbell were *not* submitted either to the Coordinating Committee or to respondent, and thus the proceedings before Chief Judge Campbell clearly did *not* constitute a hearing regarding the treble-damage plaintiffs' right to conduct discovery in their civil actions (Pl. Br., pp. 24-25).

4. The treble-damage plaintiffs' assertion (Pl. Br., p. 7) that Chief Judge Campbell's June 27, 1968 opinion and order "did not constitute a rejection of the relief sought in the petition" is flatly contradicted by the express language of the Chief Judge, who stated that he had found "no exceptional circumstances which would warrant the granting of the petition," and that "it has been determined that this petition should be denied because adequate civil procedures are currently available to the parties" (Opinion and Order, pp. 5-6, 11).

5. Finally, Chief Judge Campbell's decision was *not* based upon what occurred at the Coordinating hearing in Kansas City, and he did *not* "assume that plaintiffs were entitled to inspect the documents subpoenaed by the grand jury" (Pl. Br., p. 7). Although his opinion and order

referred to that hearing, he did *not* comment either upon its propriety or upon the soundness of the Coordinating Committee's recommendations. Accordingly, it is ridiculous even to suggest that he acted in anticipation that the treble-damage plaintiffs would be able to obtain any document production without fulfilling the requirements of Rule 34. Chief Judge Campbell's decision related solely to the petition before him, whereby the treble-damage plaintiffs sought to obtain wholesale access to grand jury documents without reference to Rule 34, in a proceeding separate and apart from their civil actions.

The Treble-Damage Plaintiffs Seek to Convey the Erroneous Impression That the Proceedings Before the Coordinating Committee Afforded Petitioners an Adequate Hearing With Respect to the Merits of Document Production

1. The treble-damage plaintiffs have carefully ignored two of the three orders which the Coordinating Committee promulgated prior to its April 19, 1968 hearing, and have quoted out of context from the third, in an effort to suggest that the Committee announced that it intended to consider the *merits* of document production at that hearing (Pl. Br., pp. 7-8). But when those three orders are read together (as they must be), they demonstrate beyond question that the April 19 hearing purported to relate *only* to the so-called "first wave of discovery"; in pertinent part, that "first wave" involved determination of "the existence, location and custodian of documents . . . , *the production of which may be sought on the merits*" (emphasis supplied), but did not involve consideration of the merits of any actual request for document production (see Pet., pp. 9-11). This procedure, of course, is in accordance

with the recommendations of the *Manual for Complex and Multidistrict Litigation,* and in fact the language of the Coordinating Committee's three orders is virtually identical to the *Manual's* description of an appropriate "first wave of discovery" in complex multi-district litigation (see Pet., p. 11, n. 9).

2. Moreover, plaintiffs' liaison counsel, in an April 3 memorandum to respondent, and again at the commencement of the April 19 hearing, stated unequivocally that consideration of the merits of Rule 34 motions at that time "would be premature," because Chief Judge Campbell had not yet ruled on the petition for production of grand jury documents (Pet., pp. 11-12).[4]

3. The treble-damage plaintiffs carefully, although not surprisingly, ignore Judge Becker's express concession that the April 19 hearing did not concern the merits of document production (Tr., p. 28; see Pet., p. 12). Instead they suggest, by quoting out of context, that "counsel for the publisher defendants argued at great length about the adequacy of 'the Rule 34 motion, which is being presently contended for'" (Pl. Br., p. 22). In fact, that quotation was taken from a statement by counsel for the publisher-defendants that "We did not believe that *the Rule 34 motion, which is being presently contended for,* was within

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[4] The treble-damage plaintiffs' suggestion that plaintiffs' liaison counsel merely "asked for a delay of the Judicial Panel's determination as to the document production order" (Pl. Br., pp. 8-9) conceals the true nature of his remarks, for he stated unequivocally that plaintiffs had not "put forward a Rule 34 motion . . . because we think it is premature," and that therefore the Coordinating Committee should not even consider the merits of document production at that time (Tr., pp. 14-15).

the scope of the Court's order [regarding matters to be considered at the hearing]" (Tr., p. 47).

4. Nor did the brief colloquy between Judge Becker and counsel for the publisher-defendants constitute an adequate hearing, or an "argument at great length," regarding the merits of document production (Pl. Br., pp. 11, 22, 24). On the contrary, during the course of that colloquy, Judge Becker expressly stated that the Coordinating Committee was then considering document production motions only "insofar as they are relevant to this case and relate to the first wave of discovery" (Tr., p. 48). And, during the same colloquy, counsel for the publisher-defendants stated that "we would appreciate the opportunity, of course, to argue this [the merits of possible production of grand jury documents] *at length at some date after Judge Campbell has ruled*" (Tr., p. 48) (emphasis supplied). Moreover, it should be noted that that colloquy occurred *after* plaintiffs' presentation to the Coordinating Committee, during which plaintiffs' counsel had not even attempted to establish "good cause" for the production of any documents, and indeed had expressly stated that consideration, or even submission, of Rule 34 motions at that time was "premature" (see *supra*, p. 11).

5. The treble-damage plaintiffs' description of Judge Becker's comments at the conclusion of the April 19 hearing suggests, erroneously, that the Coordinating Committee was thereby enunciating binding "decisions" that "good cause" existed for the production of all documents which the grand juries had subpoenaed from any of the defendants in the treble-damage actions (Pl. Br., p. 11). On the contrary, Judge Becker apparently recognized that the

Coordinating Committee had no jurisdiction to enter discovery orders which would be binding in the damage actions, because he spoke only in terms of the Committee's "recommendations" and "suggestions." He did not state that "good cause" had been established, but merely *recommended* that the various district judges "*consider* making a finding of good cause, which is necessary under Rule 34" (Tr., pp. 78-81) (emphasis supplied). Moreover, his recommendations did not relate to all documents which the grand jury had subpoenaed, but merely to "the Grand Jury documents in the Government's case *which led to the Government's case in Chicago*" (Tr., p. 80) (emphasis supplied).

6. Finally, the treble-damage plaintiffs assert that petitioners submitted "extensive written comments" to the Coordinating Committee with respect to the merits of document production, and that petitioners "in effect conceded that a motion to produce documents had been adequately presented, argued and considered" before the Coordinating Committee (Pl. Br., pp. 22, 24). But petitioners did not submit *any* written comments to the Coordinating Committee concerning the merits of document production prior to the April 19 hearing, because the Coordinating Committee had not indicated that it was then considering that issue. And surely petitioners' submission of a draft order to the Coordinating Committee after the April 19 hearing did *not* constitute a "concession" with respect to any of the matters referred to therein (Pl. Br., pp. 13-14); on the contrary, that draft order was submitted pursuant to Judge Becker's request that the parties prepare draft orders incorporating the Committee's oral recommendations, and petitioners expected

that each of the district judges before whom the damage actions were pending would hold a hearing with respect to the merits of document production. Under those circumstances, petitioners' submission of that draft order (and their letters commenting on it) clearly was not intended as, and cannot properly be characterized as, an admission or a concession, either with respect to the effect of the Coordinating Committee's "suggestions" and "recommendations," or with respect to the propriety of respondent's unquestioning adoption of those suggestions and recommendations without any hearing, argument or meaningful consideration regarding their merits.

The Treble-Damage Plaintiffs Strive to Create the Erroneous Impression That Respondent Held a Full and Adequate Hearing With Respect to the Merits of Document Production Before He Entered National Pretrial Order No. 1

1. Despite the treble-damage plaintiffs' assertions to the contrary, the extremely abbreviated pretrial conference before respondent on July 11, 1968 clearly did *not* afford petitioners either "ample opportunity . . . to contest the proposed finding of good cause" or "a full opportunity to contest and be heard on every aspect of the proposed order [National Pretrial Order No. 1], including the finding of good cause for the production of documents" (Pl. Br., pp. 15, 23). Respondent *first* distributed proposed National Pretrial Order No. 1 to counsel at the commencement of that July 11 pretrial conference, after which petitioners' counsel had an opportunity to comment only briefly (in less than five pages of transcript) with respect to the *entire* proposed order; their only reference to the merits of document production was a request that the respondent defer

ruling on that issue, pending a hearing on it at some time after the Section 1407 panel ruled on the pending motions for consolidation.

2. At the conclusion of that brief presentation, respondent directed the numerous counsel present to submit comments with respect to the entire proposed order *by the following day.* Because of that severe time limitation, petitioners' counsel were not able, and did not attempt, to argue the merits of document production in the letter which they submitted to respondent on July 12. Accordingly, that letter merely requested a hearing regarding the merits of document production, on the ground that petitioners had not yet had such a hearing (see Pet., p. 16).

3. Nevertheless, on July 16, 1968, respondent adopted National Pretrial Order No. 1 exactly as it had been promulgated by the Coordinating Committee, except for six minor changes (not relevant here) which the Committee had previously approved.[5] That order included an express finding that there was "good cause" for the production of documents, although there was absolutely nothing before respondent upon which he could properly have based such a finding. In fact, the plaintiffs in the treble-damage actions pending before respondent had never even requested the entry of any document production order (either

[5] The treble-damage plaintiffs' assertion (Pl. Br., p. 28) that "no prejudice will result to defendants because of the inclusive protective order entered by Judge Decker in connection with his production order" is patently irrelevant; petitioners here are questioning the treble-damage plaintiffs' right to obtain production of the grand jury documents in the first place, not the need for restrictions on the use of documents if production should occur.

by formal motion or otherwise), and they had never attempted to demonstrate "good cause" for *any* document production, let alone for the wholesale production of grand jury documents which respondent directed at that time.[6]

4. Finally, the treble-damage plaintiffs' suggestion (Pl. Br., pp. 18-19, 23) that petitioners "have not proceeded with sufficient diligence in this action" is utterly without merit. Initially, it should be noted that many of the petitioners here were not defendants in the actions pending before respondent on July 16 (when he entered National Pretrial Order No. 1), and consequently had no standing to question his action. Moreover, because the Section 1407 Judicial Panel was then considering various motions for consolidation of the pending treble-damage actions, petitioners believed that questions regarding the merits of document production should be argued (and appealed, if necessary) in only one jurisdiction, so as to avoid the possibility of conflicting rulings in different district or appellate courts.[7] Finally, in considering the assertion that this proceeding is not timely, it should be noted that respondent's July 16 order contemplated the production of

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[6] Despite the treble-damage plaintiffs' frequent references (Pl. Br., pp. 22, 25) to the affidavits which were filed (concurrently with the complaints) in the actions pending in the Northern District of California, those affidavits were not before respondent on July 16, when he adopted National Pretrial Order No. 1. Moreover, the unsupported conclusory averments in those affidavits manifestly do not constitute a sufficient *showing* of "good cause," as numerous cases have held (see *supra*, p. 3).

[7] Petitioners' position in this respect was consistent with Judge Becker's recent statement that Section 1407 was intended "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions" (see Pet., p. 17, n. 13).

grand jury documents *by the defendants,* rather than by the Department of Justice (as provided by respondent's December 13 order, to which this proceeding relates); consequently, petitioners anticipated that they would be able to seek review of respondent's July 16 document production order through a contempt proceeding, by refusing to produce the documents called for (see Pet., p. 4, n. 2).

The Treble-Damage Plaintiffs Assert, Incorrectly, That the Post-Consolidation Proceedings Before Respondent Afforded Petitioners a Full and Adequate Hearing With Respect to the Merits of Document Production

1. Shortly after the various treble-damage actions were consolidated before respondent in October, 1968, he scheduled a December 13 pretrial conference, and asked the parties to submit proposed agendas listing matters to be discussed at that conference. The publisher-defendants submitted an agenda stating that they proposed to move for a hearing regarding the merits of document production, but respondent summarily rejected that proposal even before the December 13 pretrial conference. In a November 27 letter to counsel, he stated simply that "National Pretrial Order No. 1 decided *authoritatively* that the documents requested by Exhibit E should be produced" (Pet., App. C, p. 11a) (emphasis supplied), thereby expressing his belief that the Coordinating Committee's "recommendations" constituted a binding decision on that issue.

2. Despite the treble-damage plaintiffs' inaccurate characterization of the December 6 proceeding before respondent (Pl. Br., pp. 23-24), petitioners did not then "argue" the merits of the proposed document production. On the contrary, petitioners merely *renewed their request for a hearing* with respect to the merits of document production,

a fact which is demonstrated graphically by respondent's statement to defendants' counsel (during that December 6 proceeding) that "I don't think you are going to be spending your time profitably trying to convince me that there isn't good cause . . . " (Tr., p. 34).

3. Moreover, petitioners did *not* submit a brief regarding the merits of document production either to respondent or to the Coordinating Committee (Pl. Br., pp. 23-24). Their only remotely related brief was filed before Chief Judge Campbell with respect to the treble-damage plaintiffs' petition for disclosure of grand jury documents; that brief, however, was *not* submitted either to respondent, or to the Coordinating Committee.

4. Finally, respondent's December 13 "finding of good cause," on which the treble-damage plaintiffs rely (Pl. Br., pp. 16-17), must have been based solely on the Coordinating Committee's "recommendations" and "suggestions" which respondent had adopted on July 16, because the treble-damage plaintiffs never even attempted to make a showing of "good cause" before respondent.[8]

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[8] Accordingly, it is impossible to ascertain the basis of the treble-damage plaintiffs' assertion that "the factors enumerated by plaintiffs in the record before the District Court fully support the order for production of documents" (Pl. Br., p. 25), because the record before respondent does not contain *any* factors which might support such an order. In this connection, the treble-damage plaintiffs' reliance on *Connecticut Mutual Life Insurance Co.* v. *Shields,* 17 F.R.D. 227 (S.D. N.Y. 1955) is unintelligible, because there is simply nothing in that opinion which has even a remote bearing on any aspect of this proceeding. Moreover, the suggestion that the petition for certiorari is based merely on the fact that "the District Court allegedly weighed one factor more heavily than another to determine that good cause had been shown" (Pl. Br., p. 21), ignores the fact that convenience and expediency are the only "factors" which have ever been asserted to justify respondent's document production order.

The Treble-Damage Plaintiffs' Discussion of the Relevant Cases Is Incomplete and Inaccurate

1. Despite the treble-damage plaintiffs' assertion to the contrary (Pl. Br., pp. 31-33), the law is well settled that documents subpoenaed by, and submitted to, grand juries constitute "matters occurring before a grand jury," and are protected by traditional grand jury secrecy (see Pet., pp. 30-31).

2. Additionally, the principles enunciated in *In Re April 1956 Term Grand Jury,* 239 F. 2d 263 (7th Cir. 1956) clearly are applicable even where there is not an "abuse and perversion of the normal functions of the grand jury" (Pl. Br., p. 33, n. 18); the Seventh Circuit itself so held in *In Re Holovachka,* 317 F. 2d 834, 836-838 (7th Cir. 1963) (Pet., pp. 30-31), a case which the treble-damage plaintiffs have conveniently ignored.[9] The two district court decisions which purportedly limit the effect of those principles (Pl. Br., p. 33, n. 18) are clearly inapplicable, because both of those cases involved the right of Antitrust Division attorneys (not private litigants) to obtain access to grand jury documents and other grand jury materials.

3. The treble-damage plaintiffs' reliance on *United States* v. *Interstate Dress Carriers, Inc.,* 280 F. 2d 52 (2d Cir. 1960) and *In Re Hearings Before the Committee on Banking and Currency of the United States Senate,* 19

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[9] In fact, the treble-damage plaintiffs have attempted to divert this Court's attention from the often-stated principle that the mere "convenience of discovery" does not warrant encroachment upon the traditional secrecy of grand jury proceedings (see Pet., pp. 30-31).

F.R.D. 410 (N. D. Ill. 1956) likewise is misplaced (Pl. Br., pp. 31-33). Both of those cases involved efforts by government agencies to obtain documents which merely "happened to be in the control of the grand jury" at the time, and in each instance the government agency (unlike the treble-damage plaintiffs here) had clearly demonstrated its "independent legal authority for the inspection" of the documents, which authority was *entirely unrelated* to the grand jury's interest in those documents (see Pet., pp. 32-33).

4. The treble-damage plaintiffs have virtually ignored the numerous cases (including *Schlagenhauf* v. *Holder, supra*) which have enunciated and applied the well-settled rule that the "good cause" requirement of Rule 34 is not a mere formality, and cannot be satisfied by a mere showing of relevance (see Pet., pp. 28-30). Instead, the treble-damage plaintiffs have again advanced the utterly false claim that the wholesale disclosure of grand jury documents which respondent has ordered is consistent with "standard procedure" in private treble-damage actions, and they have again cited several uncontested orders to "support" that claim (Pl. Br., pp. 28-29, n. 14).[10]

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[10] The impropriety of the treble-damage plaintiffs' claim in this respect is vividly demonstrated by an analysis of their assertion that, in *Eastland Construction Co.* v. *American Radiator and Standard Sanitary Corp.*, No. 46167 and related cases (N. D. Calif.), Judge Harris "after argument . . . as to propriety of discovery motion" entered a document production order similar to that entered by respondent (Pl. Br., p. 29, n. 14). In fact, counsel in those cases had *agreed*, while the cases were pending before another judge, to produce certain documents. The cases were subsequently reassigned to Judge Harris, who entered an order, *sua sponte*, staying all discovery; the June 26 "argument" upon which the treble-damage plaintiffs rely was merely a request by the parties that Judge Harris *modify that stay order* so that they could fulfill their prior commitments regarding discovery.

5. Finally, petitioners cite several cases holding that disclosure of grand jury proceedings *may* be ordered in private treble-damage actions (Pl. Br., p. 33, n. 19). Petitioners obviously do not dispute that abstract proposition. In each of the cited cases, however, the moving party had demonstrated "particularized need" for the requested disclosure of grand jury proceedings. By contrast, the treble-damage plaintiffs here have not even attempted to make such a showing.

Conclusion

In short, the treble-damage plaintiffs have attempted to convey the misleading impression that respondent's document production order was based upon a careful showing of "good cause" and "particularized need," and was entered only after petitioners had been afforded the full hearing to which they clearly were entitled. But, as the petition for certiorari and this reply brief demonstrate beyond question, nothing could be further from the truth. Petitioners have never had a meaningful hearing with respect to the merits of document production, and respondent acted entirely on the basis of considerations of expediency and convenience, without regard to the rights guaranteed to petitioners by the express requirements of Rule 34 and this Court's interpretations thereof, and without regard to traditional principles of grand jury secrecy. But such action by respondent surely is not justified merely because the instant proceeding involves complex multi-district litigation which has been consolidated pursuant to 28 U.S.C. §1407. Accordingly, because this

Court's guidance is necessary to insure that litigants' rights are protected in these circumstances, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HORACE S. MANGES
IRA M. MILLSTEIN
DONALD J. WILLIAMSON
A. PAUL VICTOR
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
Attorneys for:
Harper & Row Publishers, Inc.
Grosset & Dunlap, Inc.
Charles Scribner's Sons
E. P. Dutton & Company, Inc.
Henry Z. Walck, Inc.

W. DONALD McSWEENEY
WILLIAM A. MONTGOMERY
SCHIFF HARDIN WAITE
DORSCHEL & BRITTON
231 South La Salle Street
Chicago, Illinois 60604
Attorneys for:
The Bobbs-Merrill Company, Inc.
G. P. Putnam's Sons
The Viking Press, Inc.

EARL A. JINKINSON
JOHN W. STACK
WINSTON, STRAWN, SMITH & PATTERSON
1400 First National Bank Building
Chicago, Illinois 60603
Attorneys for:
Franklin Watts, Inc.

CONRAD W. OBERDORFER
CHOATE, HALL & STEWART
28 State Street
Boston, Massachusetts 02109
Attorney for:
Houghton Mifflin Co.

H. TEMPLETON BROWN
LEE N. ABRAMS
MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT
231 South La Salle Street
Chicago, Illinois 60604
Attorneys for:
William Morrow & Company, Inc.

SAMUEL WEISBARD
DAVID L. PORTER
McDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603
Attorneys for:
Golden Press, Inc.

BELLA L. LINDEN
DAVID BLASBAND
LINDEN & DEUTSCH
529 Fifth Avenue
New York, New York 10017
Attorneys for:
The Macmillan Company

JOHN J. McHUGH
CHADWELL, KECK, KAYSER, RUGGLES & McLAREN
135 South La Salle Street
Chicago, Illinois 60603
Attorney for:
Charles M. Gardner Co.

ROBERT W. BERGSTROM
STEPHEN M. SLAVIN
BERGSTROM & OLSON
39 South La Salle Street
Chicago, Illinois 60603
Attorneys for:
Follett Library Book Company

DAVID P. LIST
KENNETH A. MANASTER
LEIBMAN, WILLIAMS, BENNETT, BAIRD & MINOW
208 South La Salle Street
Chicago, Illinois 60604
Attorneys for:
The American News Company

EARL E. POLLOCK
ALAN H. SILBERMAN
SONNENSCHEIN, LEVINSON, CARLIN, NATH & ROSENTHAL
69 West Washington Street
Chicago, Illinois 60602
Attorneys for:
Baker & Taylor Co.

FRED BARTLIT
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS
2900 Prudential Plaza
Chicago, Illinois 60601
Attorney for:
Children's Press, Inc.

LEO ROSEN
GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022
Attorney for:
Thomas Y. Crowell Company
David McKay Co., Inc.

BRUCE A. HECKER
LEON P. GOLD
SHEA, GALLOP, CLIMENKO & GOULD
330 Madison Avenue
New York, New York 10017
Attorneys for:
Campbell & Hall, Inc.

EDGAR E. BARTON
KEVIN L. CARROLL
WHITE & CASE
14 Wall Street
New York, New York 10005
Attorneys for:
McGraw-Hill, Inc.

JOHN C. CHRISTIE, JR.
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South La Salle Street
Chicago, Illinois 60603
Attorney for:
E. M. Hale and Company

WILLIAM E. STOCKHAUSEN
SATTERLEE, WARFIELD & STEPHENS
277 Park Avenue
New York, New York 10017
Attorney for:
Holt, Rinehart and Winston, Inc.